

A Thesis Submitted for the Degree of PhD at the University of Warwick

Permanent WRAP URL:

<http://wrap.warwick.ac.uk/136501>

Copyright and reuse:

This thesis is made available online and is protected by original copyright.

Please scroll down to view the document itself.

Please refer to the repository record for this item for information to help you to cite it.

Our policy information is available from the repository home page.

For more information, please contact the WRAP Team at: wrap@warwick.ac.uk

Justifying Civil Disobedience

An Essay on Political Protest in a Constitutional Democracy

By

William Smith

A thesis submitted for the qualification of PhD in Politics and

Sociology

University of Warwick, Department of Sociology

September 2003

Best Copy Available

peer quality print

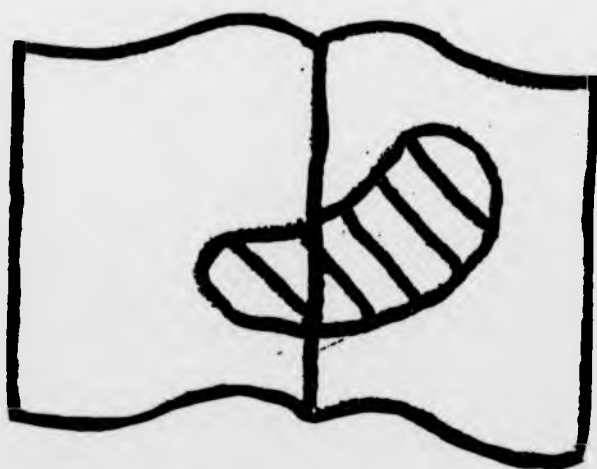


Table of Contents

Acknowledgements	iii
Abstract	iv
Introduction: Civil Disobedience in a constitutional democracy	1
I. The relevance of this essay	5
II. Some preliminary considerations	9
III. A note on method	21
IV. Structure of the argument	23
Chapter 1: John Rawls and the liberal theory of civil disobedience	28
I. Civil disobedience and public political principles	31
II. Civil disobedience and the constitutional testing of the law	46
III. Civil disobedience and the democratic character of the law	61
Chapter 2: Civil disobedience as a campaign for new basic rights	76
I. Civil disobedience and the dynamic nature of basic rights	78
II. Civil disobedience and reasonable belief	95
III. Civil disobedience and the stability of a constitutional democracy	105
IV. Civil disobedience and free riding by the insincere protester	116
Chapter 3: Jürgen Habermas and the democratic theory of civil disobedience	124
I. Habermas on deliberative democracy and civil disobedience	126
II. Habermas on the justification of civil disobedience	138
III. Towards a deliberative democratic theory of civil disobedience	150
Chapter 4: Democracy, deliberation and disobedience	162
I. The principles of a deliberative republic	164
II. Civil disobedience as deliberative contestation	176
III. Public reason as a constraint on civil disobedience	197
Chapter 5: Deliberative Contestation and the Civil Rights Movement	210
I. Why look at actual cases of civil disobedience?	213
II. Deliberative contestation and the Civil Rights Movement (1): The plausibility of the theory	219
III. Deliberative contestation and the Civil Rights Movement (2): Reforming the theory	228
Concluding Remarks: Civil disobedience and democratic citizenship	245
I. Democratic citizenship from a liberal and republican perspective	247
II. Civil disobedience and the virtues of democratic citizenship	255
Appendix 1: Breakdown of argument	266
Appendix 2: Civil disobedience and cosmopolitan citizenship	277
References and Bibliography	284

Acknowledgements

I should like to express the warmest thanks to both my academic supervisors at Warwick: Professor Robert Fine in Sociology and Professor Susan Hurley in Politics. Their wide knowledge of social and political thought and perceptive comments on previous drafts have been invaluable resources to me. Without a doubt I would have been unable to submit this thesis without their support and encouragement.

Research for this thesis has been made possible by a three-year post-graduate award from the Economic and Social Research Council. Since they have also funded my Masters degree and now an upcoming research project on Cosmopolitanism, it appears that I am accumulating quite a debt to this institution!

I should also like to thank my post-graduate colleagues and undergraduate students in Warwick for providing a stimulating and convivial environment within which to study. Finally, hearty thanks to all my friends and family for being constant sources of support and affection during the past three years.

Declaration

I declare that the full contents of this doctoral thesis are the result of my own work. None of the materials contained within it have been published, either prior to undertaking the thesis or before submission of the thesis. This thesis has not been submitted for a degree at any other university, either before or during its undertaking.

Justifying civil disobedience

Abstract: In this essay I examine whether and when civil disobedience – a principled and illegal act of political protest – is ever justifiable in a constitutional democracy. Using ideas from contemporary political philosophy, I develop a theory that forges a close connection between justifications of civil disobedience and the public political principles of a constitutional democracy. I argue that non-violent civil disobedience can be justified in any of the following three circumstances: (i) when citizens reasonably believe that law or policy violates rights, (ii) when citizens reasonably believe that law and policy should recognise and protect new rights, and (iii) when citizens reasonably believe that democratic decisions have been reached in an insufficiently deliberative fashion. Despite its illegality, justified civil disobedience represents one way in which good citizens can demonstrate fidelity to the principles that regulate political power, and one way in which they can try to close the gap between principle and practice in their societies. The account of civil disobedience developed in this thesis can be defended as (a) an original treatment of a recently neglected issue in political theory and (b) a plausible and relevant theory for ongoing conversations about the nature and role of political protest within representative democracies. In order to support these claims, throughout the thesis I apply some of the most recent developments in political theory to the old subject of political disobedience, and illustrate my arguments through referring to several recent cases of civil disobedience within representative democracies.

And the influence of laws, where they have any real effect in the preservation of liberty, is not any magic power descending from shelves that are loaded with books, but is, in reality, the influence of men resolved to be free; of men, who, having adjusted in writing the terms on which they are to live with the state, and with their fellow-subjects, are determined, by their vigilance and spirit, to make those terms be observed.

Adam Ferguson

Introduction: Civil disobedience in a constitutional democracy

In his polemical essay 'Civil Disobedience', Henry David Thoreau declares 'I think that we should be men first, and subjects afterward' (Thoreau, 1991: 29). Thoreau counterposes the dutiful political subject, who obeys his political rulers without fuss or question, and the independent and courageous man, who follows his own conscientious convictions as to right or wrong. In his essay Thoreau offers a principled defence of his own act of 'civil disobedience' – a refusal to pay taxes to a government pursuing an aggressive excursion into Mexico and a government that tolerated and enforced slavery. His defence continually makes reference to the state of his own conscience: it was *his* belief in the injustice of the war and *his* belief in the injustice of slavery that dictated his small act of resistance or non-cooperation with the American government. Civil disobedience performed a purging function for Thoreau; by engaging in it he disassociated himself from the government that purported to act in his name and indicated his alienation from the wider political community.

Thoreau's essay is one of the most influential public statements in defence of principled dissent. Indeed, it appears to be the first essay to use the expression 'civil disobedience', if only in its title.¹ His essay, and his opinion on disobedience to authority, is coloured for better or worse by a generally suspicious attitude towards government and citizenship *per se*. He has little faith

¹ Mahatma Gandhi claims that: 'the term "civil disobedience" was first used by Thoreau' (Gandhi, 1987: 112). It is likely that Gandhi was introduced to the concept of civil disobedience by Leo Tolstoy's dissemination of Thoreau's ideas on civil disobedience (Gandhi, 1987: 18).

in the democratic process or the likelihood of any kind of just collective action (Thoreau, 1991: 29, 33), little respect for the American constitution or seemingly any kind of political constitution (36, 46-47), and little time for the notion of external political power and its allegedly concomitant restriction of individual freedom (28). He characterises voting for a just policy as 'only expressing to men feebly your desire that it should prevail' (33) and damns institutional mechanisms of reform because 'they take too much time, and a man's life will be gone' (36). Given this bleak assessment of politics, it is unsurprising that Thoreau prefers what he sees as the immediate, courageous and conscientious refusal to comply with the demands of the state to the laborious process of building up support for a campaign of reform. Thoreau presents the relationship between the responsibilities of citizenship and the demands of conscience as essentially *antagonistic*. Our responsibilities as citizens to uphold the law and acquiesce to the judgement of democratic decisions are seemingly in a state of perpetual tension with our own considered conscientious judgements.

A theme of my essay is that the tension established by Thoreau between the duties of citizenship and the demands of conscience is overstated. According to the arguments pursued here, an act of civil disobedience need not simply be an act dictated by individual conscience, but an act motivated by respect for the principles that regulate a just and legitimate exercise of political power. The significance of this idea is that engaging in civil disobedience need not represent a moment when a person stops being a 'subject' and becomes a 'man'. Rather civil disobedience constitutes a moment where a person, acting in his or her

capacity as a *citizen* of a democratic republic, signals his or her belief that the principles of such a republic are being flouted by government law and policy.

In this sense there can potentially be more harmony between the demands of conscience and the responsibilities of citizenship. A person acts *conscientiously* when he or she engages in civil disobedience: in this situation a person's conscientious conviction about the wrongness of a particular law or policy informs the decision to disobey political authority. Such a person *also* acts as a responsible citizen because his or her actions are motivated by a concern for the justice and democratic character of the state. They are concerned *not just* that they do not associate themselves with laws or policies that their conscience finds abhorrent. They are *also* concerned that the state does not deviate excessively from the public political principles that bind the democratic community together, and that the terms of social cooperation continue to be respected through law and policy.

The account of civil disobedience pursued in this essay is, first and foremost, a normative exercise in political philosophy. The argument pursued is a response to the question: *when, if ever, do acts of civil disobedience – principled and illegal acts of political protest – become politically justified in a constitutional democracy?* The answer I give is informed by accounts of the moral dimension of the constitutional state that are found within the work of prominent political theorists. In particular, I argue that the justification of civil disobedience in a constitutional democracy is intimately tied up with two dimensions of legitimate

political authority: rights and democracy. Civil disobedience is said to be justified in at least the following three circumstances: (i) *when citizens reasonably believe that government law and policy violate existing rights*, (ii) *when citizens reasonably believe that the democratic community should recognise new rights in the light of new problems and concerns*, and (iii) *when citizens reasonably believe that law and policy have not been passed in a sufficiently democratically deliberative fashion*.

As well as drawing support for these hypotheses from ideas in political theory, I also suggest that they cohere with some non-philosophical beliefs about the role and justification of civil disobedience in constitutional democracies. Emphasising the relation between justifications of civil disobedience and public political principles associated with rights and democracy is not just an exercise supported through theoretical reflection. It is also an idea that resonates with prominent public statements in defence of political protest offered by the likes of Martin Luther King, Mohatma Gandhi and even Thoreau himself. Despite his tendency to trumpet the primacy of conscience over law, Thoreau is explicit in saying that what moves him to disobey is a *sense of justice* aroused by the evil of slavery and the injustice of colonial domination. Moreover, he comes close to advocating the idea that civil disobedience is not just the action of men motivated by the demands of their own conscience, but also the response of citizens motivated by violations of political principles professed by their own governments. In this spirit he asks why the government does not 'encourage its citizens to be on the alert to point out its faults and do better than it would have

them [*sic*]' (Thoreau, 1990: 35). The notion of civil disobedience as a component of active citizenship can be found even in the writings of one who has so little time for the notion of man as a member of a general political community.

In this introductory chapter I explain why the question that this essay poses is relevant to contemporary theoretical and political contexts. I also elaborate four important preliminary considerations that are necessary to orientate the following investigation. Finally, I sketch out some methodological considerations and provide a road map of the essay's structure.

I. The relevance of this essay

One of the motivations for undertaking this exercise is that civil disobedience has, in recent times, become something of an under-theorised concept in political philosophy. Political philosophers – primarily in America – discovered the concept of civil disobedience during the 1960s. During this time, a huge amount of legal and political theory was devoted to analysing the concept of civil disobedience and discussing what, if any, role civil disobedience might play in a constitutional democracy.

The reasons for this interest are not hard to fathom. America in the 1960s was marked by a high degree of internal tension and active protest movements. The civil rights movement and student anti-Vietnam war movement engaged in frequent acts of political protest, and often made a point of engaging in open

violations of laws during the course of their campaigns, courting arrest and prosecution. In response to this development, legal and political philosophers sought to understand civil disobedience as a distinct political phenomenon and also to explore the legal and moral issues surrounding this form of protest (Bedau, 1969). With the passing of these popular campaigns, civil disobedience for a time became a less pronounced feature of political life, and political philosophers moved on to other issues, mostly in the invigorated field of distributive justice.

Whilst the tendency for civil disobedience to drop off the philosophical radar is understandable, it has been unfortunate for at least two reasons. Firstly, despite the passing of the civil rights and student movements, civil disobedience as a distinct type of political protest has not entirely left political life. In fact, throughout the last three decades civil disobedience has been employed in constitutional contexts over a wide range of issues and concerns. In particular, there has been a growing tendency for what are sometimes called 'new social movements' to engage in publicity generating campaigns of civil disobedience (Porta and Diani, 1999: 178-179). The term 'new social movements' emerged in the social sciences as a way of describing the range of protest networks and campaigning groups that became active from around 1970 onwards (Crossley, 2002: 149-167). These associational networks comprised concerned citizens who aimed to publicise allegedly neglected issues and problems and place them on the agenda for public deliberation and democratic action. Given the difficulties of securing access to political resources such as mass media or sites

of public deliberation, new social movements embraced a wide range of protest techniques, including civil disobedience.

During the 1980s, the use of civil disobedience by environmental groups and peace activists in nations such as West Germany and the United Kingdom raised issues about the justification and role of illegal political protest in constitutional contexts (Dewar *et al.*, 1986). At the turn of the millennium, the protest culture that has arisen around the so-called 'anti-capitalist' movement has continued to keep questions about the use of disruptive tactics like mass demonstrations and civil disobedience on the agenda (Callinicos, 2003; Monbiot, 2003; Held and McGrew, 2002; Kaldor, 2003; Sklair, 2002). So, whilst political theorists have tended to overlook civil disobedience in recent times, it continues to proliferate in the public political cultures of democratic communities.

Secondly, within political philosophy there have been theoretical innovations that are potentially very relevant to the issue of civil disobedience. In particular, developments in democratic theory and specifically the growing interest in *deliberative democracy* appear to have a high degree of relevance for discussions about the extent of citizens' duty to comply with the law. A feature of deliberative democracy that makes it particularly relevant to discussions about the role and justification of civil disobedience in a constitutional democracy is its emphasis on democratic legitimacy.

Deliberative democracy elaborates the necessary characteristics that democratic decisions and/or procedures should display if they are to be defended as legitimate. For instance, some theories of deliberative democracy insist that in order to be legitimate democratic deliberation must proceed in accordance with norms of public reason, at least over some laws and policies (Rawls, 1999a; Cohen 1997a). Other theories of deliberative democracy place emphasis on the importance of securing fair and inclusive procedures of democratic deliberation, which entails some degree of equality and fair access to sites of public deliberation (Young, 2000; Bohman 1996; Pettit, 1997; Habermas, 1996). It might be thought that if actual deliberation fails to respect these conditions of legitimacy, then the binding power of its decisions becomes weaker and a potential space for justified civil disobedience opens up. Generally speaking, though, deliberative democracy has tended to focus much more on questions of institutional design than on non-institutional means of contributing to or stimulating public deliberation. There has been little by way of a systematic account of how theories of deliberative democracy might furnish a theory of civil disobedience.

This essay seeks to provide a contemporary theory of civil disobedience, which draws upon recent developments in political philosophy and which is relevant to contemporary political debates over the role and justification of civil disobedience in constitutional democracies. The theory it is not advanced as a complete and comprehensive treatment of the subject. Rather, it is presented as a stimulant of and contribution to ongoing conversations in philosophical and

political contexts about the justification and role of civil disobedience in constitution democracies.

II. Some preliminary considerations

The question that this essay seeks to explore is when, if ever, do principled acts of civil disobedience become politically justified in a constitutional democracy? In order to proceed it is important to elaborate a few preliminary considerations, in particular: (i) the definition of civil disobedience that I rely on, (ii) the significance of focusing on constitutional democratic contexts rather than non-democratic contexts, (iii) the avoidance of any commitment to a controversial notion of political obligation or a duty to obey the law, and (iv) the type of political justification that I am interested in.

(i) A cursory glance at the literature on civil disobedience reveals that there is very little consensus over the definition of this type of protest. Generally speaking the literature reveals a broad spectrum of definitions, offering differing degrees of detail. At one extreme of the spectrum is the bare characterisation suggested by Howard Zinn, for whom civil disobedience should be understood merely as 'the deliberate violation of law for a vital social purpose' (Zinn, 1968: 39). At the other extreme is the exhaustive definition offered by Brian Smart, for whom: 'civil disobedience must be a vehicle of non-natural meaning: it is a protest and may also be a threat and information addressed to governments and the public; it is *either* a deliberate violation of the law or of an injunction *or* a

deliberate challenge of the official interpretation of the law; it involves an appeal to principles of public concern that are held to have been breached; it may involve violence either as the coercion of force or as the coercion of persuasion or as a merely dramatic device but it cannot combine the coercion of force by violence with the overthrow of government' (Smart, 1991: 211).

In between these extremes of bare and substantial definitions is a range of different characterisations. According to John Rawls civil disobedience is 'a public, non-violent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or policies of the government' (Rawls, 1972: 364). In a similar vein Carl Cohen claims that 'an act of civil disobedience is an illegal public protest, non-violent in character' (Cohen, 1966: 3). For Morris Keeton civil disobedience is 'an act of deliberate and open violation of law with the intent, within the framework of the prevailing form of government, to protest a wrong or to accomplish some betterment in the society' (Keeton, 1965: 508). According to Jean Cohen and Andrew Arato, 'civil disobedience involves illegal acts, usually on the part of collective actors, that are public, principled and symbolic in character, involve primarily non-violent means of protest, and appeal to the capacity for reason and the sense of justice of the populace' (Cohen and Arato, 1992: 587).²

² These definitions are merely a representative selection of those that can be found in various political and legal studies on civil disobedience (see the essays in Bedau, 1969 and Bedau, 1991).

The working definition that I propose to employ in this essay is as follows: *civil disobedience is a public and illegal act of political protest by an individual or group signalling opposition to government law or policy.* Before contrasting this with some of the definitions above, I shall briefly elaborate on the central characteristics of my definition. Civil disobedience is a *public* act in the sense that it is committed openly and without any attempt at concealment. This means that protesters make no attempt to conceal that the law has been broken or that it is they who have broken the law. In this fashion, protesters hope to generate publicity for their act and consequently draw attention to their grievance. Civil disobedience is *illegal* in the sense that protesters intend that their act be understood as a deliberate violation of a particular law.³ The law in question may be the law that they oppose, or it may be a symbolic attempt to draw attention to the law or policy they oppose by violating other laws. As an example, protesters might violate right of way laws or laws restricting access to particular locations in order to protest aspects of defence policy or aspects of trade and industry policy. Civil disobedience is a *political* protest in the sense that it is primarily directed towards achieving a change in law or policy, brought about through generating popular momentum for legislative action or reconsideration of policy.⁴ In this sense civil disobedience is a communicative act directed both towards political representatives who hold political power and the wider democratic community of free and equal citizens.

³ This is a similar formulation to that preferred by Rawls and Cohen and Arato: 'By "illegal" we mean that there is an *intentional* violation of the law' (Cohen and Arato, 1992: 739ff).

⁴ Like other theorists, I assume that the emphasis on changing law and policy generally distinguishes this form of political protest from revolutionary action geared towards removing an unjust sovereign or government, at least in constitutional democracies (Rawls, 1972: 367-368; Dworkin, 1985: 105; Habermas, 1985: 99; Carter, 1998: 68-69).

The characteristics cited above are generally non-controversial and, with one exception, cohere with the definitions cited above. The exception is Smart's definition. According to my understanding (and most others), an act of civil disobedience is illegal in the sense that protesters intend that their act should be understood as a deliberate violation of the law. Smart employs a broader definition that incorporates not just 'deliberate violation of law' but also 'a deliberate challenge to the official interpretation of the law' (Smart, 1991: 211). The second aspect of this definition incorporates a practice that has come to be known as the 'constitutional testing' of the law (Rawls, 1972: 367; Cohen and Arato, 1992: 580-582). This happens when citizens violate a particular law with the intention of persuading the democratic community and judicial authorities that the law in question is unconstitutional.

For the purposes of understanding the specific issues raised by civil disobedience in a constitutional democracy I think that it is wise to try and keep 'civil disobedience' and 'constitutional testing' distinct as analytic categories. On the one hand citizens who engage in civil disobedience are clearly indicating that they regard the law or policy they oppose as so immoral or unwise that the usual reasons for obeying law can be justifiably set aside. On the other hand citizens who engage in constitutional testing are claiming that, in their considered opinion, the law is unconstitutional and hence not binding on them in the same way as constitutional laws. In the former case, citizens claim they are morally justified in breaking the law; in the latter case citizens claim that the law in

question should not be seen as a constitutionally valid law at all. I elaborate on this issue in the first chapter, but for now will merely indicate that, according to the definition given here, protesters must intend that their act be understood by the democratic community as illegal.

Whilst the dimensions of publicity, illegality and political protest cited above cohere with most other definitions, my definition is a little less exhaustive than some of the others cited. Generally speaking, this is because the essay pursued here is an investigation into the substantial issues surrounding the *justification* of civil disobedience in a constitutional democracy. The significance of this is that a barer definition of civil disobedience is preferred, so that some of the more contentious issues are given over to moral discussion. This is the main reason why, in contrast to some other authors, non-violence is not contained in my definition.⁵ By simply defining civil disobedience as non-violent, we run the risk of bracketing a difficult moral issue and assuming something that should perhaps be argued for. In the essay that follows I assume that violent civil disobedience is a conceptual possibility and discuss the issue of violence from the point of view of justification. The theme of violence is touched on in chapter 2 and developed more fully in chapter 5.

⁵ The issue of whether or not civil disobedience should be understood as violent or non-violent by definition is one of the persistent disagreements within the literature. Of the examples I listed above Rawls, Cohen and Arato, and Carl Cohen insist that civil disobedience is non-violent by definition whereas Zinn, Smart, Keegan and myself allow definitionally that civil disobedience can be violent (although may not necessarily be *justifiably* violent).

(ii) The focus of this essay is the justification of civil disobedience in a constitutional democracy. It is important to stress at the outset, therefore, that I do not consider the justification of civil disobedience in non-democratic states, such as dictatorships or other forms of totalitarian regimes. This limitation of the investigation in part reflects the fact that most of the philosophical literature on civil disobedience, particularly that which deals with its moral justification, focuses on democratic rather than non-democratic contexts. One of the reasons for this is that many theorists accept John Rawls' view that there can be little moral controversy over the appropriateness of using civil disobedience 'as a tactic for transforming or even overturning an unjust and corrupt system' (Rawls, 1972: 363). By contrast, civil disobedience in a constitutional democracy is said to raise more serious moral issues. If a democratic regime ensures, at least for the most part, that its citizens enjoy basic rights and privileges and have opportunities to participate in democratic politics, then it may appear that citizens have greater reason to obey the law than they would if they lacked such entitlements.

The idea that civil disobedience presents itself as a moral problem for constitutional democracies is certainly not something that I would dispute. I say a little more about the specific nature of this moral problem in a moment. However, I think it is worth stressing that civil disobedience in non-democratic contexts does raise some issues that a genuinely *comprehensive* treatment of civil disobedience could productively explore. Some writers have claimed that persons living under regimes that they perceive to be authoritarian, totalitarian or

colonial have a moral responsibility to temper their acts of resistance according to moral principles. A prominent example is Mahatma Gandhi, who defended non-violent mass civil disobedience campaigns as the only legitimate means of overthrowing a despotic regime.⁶ More recently, the commentator Edward Said has suggested that the Palestinian people should not oppose what he calls 'Israel's daily expansionism' through a new intifada but instead through a campaign of mass civil disobedience (Said, 2002: 258). Whilst engaging in illegal acts in a non-democratic context *per se* appears not to raise difficult issues, there clearly is scope for debate over the *form* and *conduct* of such illegal acts. This essay focuses on civil disobedience in democratic contexts partly because of the specific relevance of recent developments in political theory to this question, and partly because of practical considerations of time and space.⁷

(iii) As briefly mentioned, most writers seem to follow Rawls in assuming that civil disobedience in a constitutional democracy raises more serious moral problems than civil disobedience in non-democratic contexts. This raises potentially complex and controversial issues about the nature of the relationship between citizens and the law in constitutional democracies. In particular, it raises the thorny issue of whether or not citizens in constitutional democracies have any kind of general *duty* or *obligation* to obey the law. For the most part I

⁶ Gandhi appears flatly to contradict Rawls' suggestion that 'any means to [the] end' of 'transforming or even overturning an unjust and corrupt system' can be justified (Rawls, 1972: 363; Gandhi, 1987: 88-125).

⁷ A discussion of civil disobedience in non-democratic contexts can be found in Randle (1994). A discussion that tends to highlight some of the similarities between civil disobedience in a constitutional democratic context and civil disobedience in a non-democratic context is Haksar (1991).

do not enter into debates canvassed in the voluminous literature on this subject.⁸ These debates touch on such issue as whether or not there is such a thing as an obligation or a duty to obey the law; whether or not such an obligation or duty is universally applicable to all subjects of the law; and whether or not such an obligation is grounded on consequentialist, utilitarian, de-ontological, consent or fair play considerations. I hope to avoid such controversy by assuming that civil disobedience in a constitutional democracy raises moral issues because there are at least powerful general *reasons* for citizens to comply with the law within such regimes.⁹

The idea that there are powerful reasons for compliance with the law in constitutional democratic contexts is one that is quite widely shared within contemporary political thought. In his exhaustive study of the law's claim to obedience, Kent Greenawalt concludes that even though there may be no 'single source of [legal] obligation that applies to all citizens...people often have powerful moral reasons for obeying the law' (Greenawalt, 1989: 4). In his study of political obligation, A. John Simmons finds none of the traditional accounts supporting a duty or obligation to obey the law persuasive, but still argues that even without such an account there are 'still strong reasons for supporting at least certain types of government and for obeying the law' (Simmons, 1979: 193).

The reasons that I think we have for generally complying with the law in constitutional regimes are not especially novel. Essentially they are both

⁸ For an accessible overview of the subject of political obligation see Hampton (1998) ch. 1-3.

⁹ By 'general reasons' I mean reasons that argue in favour of general compliance with laws.

principled and *pragmatic* reasons. We have principled, or moral, reasons to comply with the law in a constitutional democracy because of the moral quality of the laws in these regimes and the way in which these laws are made. Following liberal political theorists such as Rawls and Dworkin, we can say that the tendency for law to respect principles of justice, such as protection of basic rights, should count as a strong reason to comply with the law. We hope that a constitutional regime guaranteeing basic rights will allow citizens freedom from state interference to pursue activities that are especially valuable to them. Provided that these rights are respected, citizens are treated with some degree of equal concern and respect (Dworkin, 1978: 180-182). Following democratic political theorists such as Jürgen Habermas and Joshua Cohen, we can say that the tendency for law to be generated in a democratic fashion, for instance through popular elections and deliberative procedures, should also count as a strong reason to comply with the law. We hope that a democratic regime facilitating popular participation in law-making processes, and informed public deliberation prior to decision making, will allow citizens an authorial role in making the laws that govern them. Provided that these procedures are established, citizens can be equal and active agents in determining the will of the democratic community.¹⁰

As well as having principled reasons for complying with the law, we can also adduce pragmatic reasons to comply. Pragmatic reasons relate to the efficacy of

¹⁰ I do not mean to establish a crude dichotomy between these liberal and democratic theorists. All would accept the importance of rights and democracy as moral reasons for complying with the law, though they might have different accounts of how these two dimensions are related, how each are should be interpreted, and how we should understand their normative foundations.

general compliance to law for all citizens in a democratic community. One of the pragmatic reasons for complying with law is that it allows us to enjoy a degree of social stability that we might not otherwise enjoy. Law is a powerful, though not perfect, medium for social co-ordination (Habermas, 1996: chapter 1). If individuals and groups know that everyone is likely to comply with the law, it gives them a degree of security and social stability that they may otherwise lack. It is important to stress that in a constitutional democracy pragmatic reasons for compliance must go hand in glove with principled reasons. As Habermas says, legal norms must guarantee two things at the same time: 'both the legality of behaviour, in the sense of an average norm compliance that, if necessary, is enforced by sanctions; and the legitimacy of the rule itself, which always makes it possible to follow the norm out of respect for the law itself' (Habermas, 1996: 31).

The problem of civil disobedience in a constitutional democracy arises, then, because we have powerful principled and pragmatic general reasons to obey the law in such regimes. Civil disobedience represents an illegal form of political protest. When citizens engage in it they are claiming that their grievance against the state is so strong that these normal reasons do not apply, or apply with less force than they otherwise would. In what follows I assume that arguments in favour of civil disobedience must acknowledge these powerful reasons for compliance with law. At no time do I discuss the possibility that these reasons might form part of a broader argument for some kind of legal or political obligation or duty. Given philosophical controversy over these concepts it seems

wise to avoid them as far as possible (Simmons, 1979; Dworkin, 1978: 193; Lyons, 1998: 29-30). Instead I start from the less controversial premise that in constitutional democracies we can cite powerful reasons for compliance.¹¹

(iv) Finally, I should say a brief word about the kind of justification I am interested in. The essay is concerned with the *political* justification of civil disobedience. Political justification is a matter of justifying one's actions to other members of the democratic community to which one belongs. When civilly disobedient citizens engage in justificatory discourse they must remember their own status as democratic citizens and the status of their intended audience as democratic citizens. They attempt to convince other citizens that their actions are compatible with their status as citizens, and compatible with the political principles that binds together the democratic community. In particular, they attempt to convince other members of the democratic community that, despite deliberately breaking the law, they have not acted as bad citizens and that their act should not be characterised as immoral.

An important point is that political justification does not necessarily imply legal justification. If citizens attempted to offer a legal justification for their act, then they would not be engaged in civil disobedience, as I understand it. This is because they would not intend that their act be understood as clearly illegal. Rather, they would claim that their act should be seen as justified under the law

¹¹ I would not want to deny that the general reasons for compliance with the law *might* generate general duties or obligations. The point of the above discussion was merely to emphasise that I do not want to assume the existence of such duties or obligations, given philosophical controversy over the nature and grounds of these concepts.

and that they should be exempt from any legal sanctions that would ordinarily follow from engaging in illegal action. If civilly disobedient citizens offer a successful political justification, then it might follow that legal sanctions might be less harsh than they otherwise would be. As we shall see in chapter 2, some theorists argue that civilly disobedient citizens should be treated with leniency by a mature constitutional democracy; for instance, as manifested in light sentences or perhaps an exercise in prosecutorial discretion not to pursue convictions (Dworkin, 1978: 206-222). Generally speaking, the essay favours fostering a climate where civil disobedience is accepted as a component of a healthy democratic culture. This does not necessarily mean that legal action is not taken against protesters, but it does mean that civil disobedience is viewed as a principled and political act rather than as a mere manifestation of criminal tendencies (Habermas, 1985: 96-99; Arendt, 1969: 99-102).

To summarise: in this section four important preliminary considerations were introduced. First, civil disobedience is a public and illegal act of political protest by an individual or group wishing to indicate opposition to a government law or policy. Second, the essay is concerned with civil disobedience within the context of a constitutional democracy, not non-democratic contexts. Third, the essay does not start from the assumption that there is necessarily a political obligation or duty to obey the law in constitutional democracies, but from the assumption that there are powerful principled and pragmatic reasons for compliance with the law in such regimes. Fourth, the essay is concerned with the political

justification of civil disobedience in a constitutional democracy, which does not imply legal justification.

III. A note on method

This essay is an exercise in contemporary political theory. It is orientated towards a critique of existing accounts of civil disobedience in a constitutional democracy, and the development of an original and relevant normative theory. In relation to other methodologies in political philosophy, the approach of this essay bares the closest resemblance to that associated with John Rawls: reflective equilibrium. In Rawls' theory of justice, reflective equilibrium describes a process of seeking to achieve a fit between our considered convictions about justice and our theory of justice (Kymlicka, 2002: 5-6; Rawls, 1972: 46-53; Pettit, 1997: 130). In this essay, I apply this approach to the subject of civil disobedience in constitutional regimes.

There seem to me to be two reasons for pursuing this method. First, achieving reflective equilibrium enables us to have more faith in both our theory and our considered intuitions. Our theory is revealed as one that coheres with convictions that we strongly identify with as citizens in a democratic community – for instance, convictions about fairness or freedom from domination, or the role of political protest. Our convictions, on the other hand, are given a theoretical support that they may have lacked previously. Instead of having only a bundle of considered convictions, we now have a theory that systematises these convictions

and presents them as a coherent whole. Second, reflective equilibrium as a method ensures that our theory remains anchored in the political and social life of constitutional democracies. It ensures that a theory of political phenomena has a mooring in society, by establishing a connection between theoretical speculation and considered convictions and ideas formed in actual democratic contexts. This dimension of reflective equilibrium is nicely captured in Habermas' remark on Rawls' theory of justice: 'by demonstrating that the principles of justice reflect only the most reasonable convictions actually held by the population, the theory of justice is supposed to find its "seat" in political life' (Habermas, 1996: 59).

In this essay, I try to follow this style of philosophy by providing an account of civil disobedience informed by theoretical ideas about rights and democracy *and* considered convictions about the justification and role of illegal political protest in constitutional democracies. The hope is to advocate normative recommendations that reconcile both theoretical ideas and considered convictions. In order to show that the theory I advocate equilibrates not just with my own considered convictions, I continually refer to actual cases of civil disobedience in constitutional democracies. I use these cases to draw parallels between the theory and practice of civil disobedience, and to show that the theory's recommendations resonate with some prominent and generally respected protest campaigns. Actual cases can also perform an illustrative function, by offering practical examples of civil disobedience campaigns that would be justified (or unjustified) according to my theory.

V. Structure of the argument¹²

The argument that I pursue in this essay is that civil disobedience in a constitutional democracy is politically justified when civilly disobedient citizens can make a reasonable appeal to public political principles of rights and democracy. The argument is elaborated through five chapters.

The first chapter offers a critique of John Rawls' theory of civil disobedience. Rawls' theory constitutes a good starting point, because it represents one of the first major attempts by a prominent political thinker to discuss the nature, justification and role of civil disobedience in a constitutional regime (or a 'nearly just' regime as Rawls puts it). According to Rawls, civil disobedience is a potentially justifiable way of protesting against clearly and substantially unjust laws and policies, in particular laws and policies that violate his first principle of justice protecting a range of equal basic liberties for all citizens. The chapter endorses and defends the guiding intuition behind Rawls' theory: that civilly disobedient citizens should justify their illegal actions by appealing to the public political principles that regulate the major political institutions in society. In a more critical vein, the chapter raises two complaints about Rawls' theory. Firstly, Rawls risks undermining the distinction between justified civil disobedience, where citizens openly and deliberately violate law, and

¹² A fuller breakdown of the argument, in the form of a point-by-point summary of each chapter, is presented in appendix I.

constitutional testing, where citizens 'disobey' a law in order to challenge its constitutional status. Secondly, Rawls provides a limited justification of civil disobedience in a constitutional regime, by focusing only on public political principles associated with rights (or justice) and not on public political principles associated with democratic practices and procedures. I suggest that both of these criticisms can be responded to by *broadening* the justification of civil disobedience.

The second chapter pursues this line of thought by suggesting a broader account of justified civil disobedience to the one that Rawls offers. According to Rawls, civil disobedience is only justified in the light of clear and substantial violations of his first principle of justice protecting a range of equal basic liberties and to blatant violations of his fair equality of opportunity principle. In this way Rawlsian civil disobedience is essentially a defensive response to violations of already established rights. In contrast to Rawls, I suggest that civil disobedience might also be justified as part of a creative campaign to entrench new rights. As well as offering an attractive normative theory of civil disobedience, making this move enables us to more fully distinguish between civil disobedience and the constitutional testing of law. In the remainder of chapter 2 I respond to some potential criticisms of defending civil disobedience in this fashion: in particular criticisms relating to the ease with which citizens can justify civil disobedience, fears about consequent threats to stability and fears about the danger of insincerity on the part of civilly disobedient citizens.

The third chapter elaborates on the idea that justifications of civil disobedience might not just involve appealing to public political principles associated with rights, but also democratic principles. This idea is introduced through assessing some democratic theories of civil disobedience, notably theories advanced by Jürgen Habermas and Jean Cohen and Andrew Arato. In general the chapter commends these theories for introducing potentially relevant considerations about the place of public deliberation in democratic societies, and the role that civil disobedience might play in contributing to ongoing deliberation throughout the democratic community. However, the chapter criticises the weak account these theories offer of how civil disobedience is to be justified in the light of deliberative principles. By failing to establish a close connection between justifications of civil disobedience and deliberative democratic principles, these accounts do not offer a clear and focused justification for civil disobedience.

The fourth chapter seeks to provide such a justification by developing a deliberative democratic theory of civil disobedience, to *augment* the earlier suggestion that civil disobedience can be justified in response to rights violations or as part of a campaign to create new rights. The theory, which I call *civil disobedience as deliberative contestation*, suggests that civil disobedience can be justified in response to violations of deliberative democratic principles. In particular, three types of violations create the conditions for justified civil disobedience: (i) failure to include all members of the democratic community in ongoing deliberation, and failure to take into account the interests of non-members affected by the outcomes of democratic deliberation; (ii) when ongoing

deliberation is prone to manipulation or bias by powerful participants; (iii) when ongoing deliberation fails to be receptive to relevant information and concerns. At the end of this chapter I provide a provisional statement of the theory of civil disobedience developed in this essay.

The fifth and final chapter moves the essay away from a purely theoretical exercise and compares civil disobedience as deliberative contestation with a prominent campaign of civil disobedience carried out in recent times. The two aims of this chapter are to demonstrate the plausibility of the theory as an account of civil disobedience within constitutional democracies, and to demonstrate the receptivity of the theory to relevant ideas about protest expressed by actors in the public spheres of constitutional democracies. The case that the chapter focuses on is that of the Civil Rights Movement in America during the 1950s and 1960s. The chapter suggests that civil disobedience as deliberative contestation equilibrates with the justification of civil disobedience advanced by Martin Luther King, and to a lesser extent with the reaction of other members of the democratic community to the campaign. By demonstrating that such an influential campaign of civil disobedience resonates with deliberative contestation in this way, it is hoped that the plausibility of the theory's recommendations can be supported. The chapter also suggests that the theory can be developed in the light of ideas expressed by King: in particular ideas about the relevance of the *conduct* and *context* of an act of civil disobedience. By developing the theory in this way, it is hoped that theory itself offers a more

complete picture of justified civil disobedience, and demonstrates its receptivity to the social and historical practice of civil disobedience.

The essay concludes by revisiting the subject touched upon at the beginning of this introduction, assessing how the idea of civil disobedience fits into a broader conception of democratic citizenship. Contra the impression created by Thoreau, a disposition to engage in civil disobedience can be defended as one of the ways in which citizens pursue the virtues of good citizenship. Whilst reading the essay, readers may find it useful to refer to appendix I, which contains a point-by-point summary of the claims made in each chapter.

Chapter 1: John Rawls and the liberal theory of civil disobedience

Contemporary political philosophers, in contrast to many of their predecessors, have given the question of civil disobedience considerable attention.¹ A prominent example is John Rawls, who elaborated a concise and influential theory of civil disobedience in his *A Theory of Justice*. Rawls' theory is interesting for a number of reasons. Firstly, Rawls explicitly delineates the problem of civil disobedience so that it falls between the more traditional questions of rightful revolution and conscientious refusal.² Therefore, his theory represents one of the first major attempts within contemporary political philosophy to address some of the specific moral issues surrounding this form of illegal protest. Secondly, as one of the most prominent political philosophers of the last century Rawls' theory represents something of a definitive liberal approach to civil disobedience. The guiding intuition of his theory, that civil disobedience in a constitutional democracy is justified against laws and policies that violate basic liberties, has often been taken as a starting point for subsequent

¹ Modern political thinkers, such as Locke and Kant, tended to focus on the idea of rightful revolution, rather than the specific issues associated with civil disobedience (e.g. overthrowing a government, rather than campaigning to change particular laws and policies). Locke's views on revolution were elaborated in his *Second Treatise of Government* (Locke, 1993: 363-387). For some useful discussions of Locke's ideas on revolution, and the issues raised by trying to apply these ideas to civil disobedience, see Thomas (1995), Terchek (1998) and Valcke (1994). Kant's views on revolution were elaborated in several published works, most notably in *The Metaphysics of Morals* (Kant, 1996: 95-98, 136-138) and 'Theory and Practice' (Kant, 1970: 79-84). For some useful discussions of Kant's ideas on political resistance, and the issues raised by applying them to civil disobedience, see Arntzen (1996), Nicholson (1976), Schwarz (1964), Korsgaard (1997), and Holtman (2002).

² Conscientious refusal is understood by Rawls as a situation where a person refuses to comply with a direct political or legal command that he or she objects to on grounds of conscience. The conscientious refuser merely seeks an exemption from a specific requirement, whereas the civil disobedient seeks a change in law and policy based on public political principles (Rawls, 1972: 368-371).

discussions (Habermas, 1985: 100-103; Cohen and Arato, 1992: 568-569). Thirdly, Rawls presented his theory at a time when there was a great amount of intellectual interest in civil disobedience, particularly in America. This intellectual interest reflected the prevalence of civil disobedience in America throughout the late 1950s and 1960s, a prevalence mostly attributable to the highly publicised activity of the civil rights and student movements. Therefore the theory has a certain historical interest as a theoretical response to practical and pressing political concerns.

This chapter explores Rawls' theory of civil disobedience, with a view to providing a sympathetic critique. The critique is sympathetic because the argument that shall be pursued throughout this essay fundamentally shares Rawls' intuition that civil disobedience in a constitutional democracy should be justified through an appeal to public political principles. In particular, civil disobedience can be justified to the wider citizenry of a democratic community when laws and policies of government violate the normative principles that bind together members of that democratic community. Political decisions lose their binding power over members of that community if those decisions violate the political principles that ordinarily give us moral reason to accept them. In the first section of this paper I explore Rawls' elaboration of this intuition; in particular his belief that the soundest foundation for justified civil disobedience is supplied by his theory of justice. According to Rawls, his two principles of justice are the best account of the fair terms of social co-operation amongst members of a democratic community, and must find expression in the political

and social institutions governing that community. Civil disobedience becomes justifiable, for Rawls, when laws and policies violate those principles in a sufficiently serious way. I defend Rawls' theory both as a strong account of the publicity of civil disobedience in a constitutional democracy, and as a relevant theory for practical deliberation about the justification of civil disobedience in actually existing democratic societies.

The rest of the chapter is given over to a critique of Rawls' theory. In particular I explore two possible objections: one about the internal coherence of the theory and the other about the normative strength of the theory as a justification of civil disobedience. The first criticism has to do with an apparent paradox in Rawls' theory. The paradox is that in limiting civil disobedience to clear and substantial violations of his principles of justice, Rawls risks eliminating the distinction that he wants to retain between justified civil disobedience and the constitutional testing of law. This is because justified civil disobedience involves making an appeal to principles of justice that enjoy constitutional recognition within a just or nearly just regime. Therefore it is difficult to distinguish between the claim that a law or policy is unjust, because it violates public political principles, and the claim that the same law or policy is unconstitutional.

The second criticism has to do with the limits that Rawls places on justified civil disobedience. By limiting justified civil disobedience to clear and substantial violations of his principles of justice, specifically the first principle and the second part of the second principle, Rawls' theory is vulnerable to the moral

criticism that his theory is too restrictive. In particular, his theory is vulnerable to the charge that civil disobedience might also be a response to violations of *democratic* principles.

I. Civil disobedience and public political principles

In this section I describe Rawls' theory of civil disobedience, and discuss its strengths as an account of public and illegal protest in a constitutional democracy. This section is broken down into three parts: (1) a description of Rawls' theory, (2) a qualified defence of Rawls' overall method of constructing justifications of civil disobedience, and (3) a qualified defence of the relevance of Rawls' theory for practical discussion of civil disobedience within actually existing democracies.

(1) John Rawls situates his theory of civil disobedience within a broader discussion about the ideal of a just society.³ According to him, 'justice is the first virtue of social institutions...laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust' (Rawls, 1972: 3). His vision of a 'realistic utopia' is a fair system of co-operation between persons who design their institutions according to two principles of justice. The first ensures for everyone an equal range of basic liberties, covering

³ Rawls' theory of civil disobedience is broad, and touches on a variety of issues relating to the definition, justification and role of civil disobedience within a constitutional democracy. I focus here only on those aspects of his theory that I take to be relevant to the larger argument I pursue throughout this essay. For some helpful summaries and discussions of Rawls' broader arguments about justice, see Kukathas and Pettit (1990), Kymlicka (2002), Daniels (1975a), Freeman (2003).

most of the liberal and political rights associated with the idea of constitutionalism: such as liberties of speech, association, conscience, and the right to vote and stand for election. The second ensures fair equality of opportunity and calls for inequalities in income and wealth to be arranged in such a way that they are to the greatest benefit of the least advantaged members of society. These principles can be applied to the *design* of state institutions, to the *reform* of actually existing institutions, and to *criticism* of laws and policies implemented by constitutional democracies.

Most of Rawls' theory is given over to an elaboration and defence of the political principles that should govern the basic structure of society, understood as the main social and political institutions that facilitate social co-ordination and significantly influence the expectations of all members of society. However, he also spends some time discussing the principles that apply directly to citizens who live under those institutions. One of the significant principles he discusses and defends refers to the extent to which citizens are morally bound to obey the laws and policies of the ideally just institutions he defends. In order to answer this question, Rawls articulates a 'natural duty' to 'support' and 'further' just institutions. According to Rawls, 'this duty has two parts: first, we are to comply with and to do our share in just institutions when they exist and apply to us; and second, we are to assist in the establishment of just arrangements when they do not exist, at least when this can be done with little cost to ourselves' (Rawls, 1972: 334). The crucial variable in articulating a duty to obey the law, then, is not 'consent' or 'obligation', but a duty predicated upon the justice of the

institutions that make up the basic structure of society. For Rawls, the questions of when our duty to obey the law does *not* hold and when our dissent to the law might take the form of civil disobedience arise when we believe that actual laws and policies can be criticised for being insufficiently just.⁴

Rawls addresses his theory of civil disobedience to what he calls a 'nearly just' society, which is 'well-ordered for the most part but in which some serious violations of justice nevertheless do occur' (Rawls, 1972: 363). In this way he locates discussions of civil disobedience within 'non-ideal' theory, which addresses problems that emerge when there are serious departures from conditions of 'ideal' justice. Rawls justifies civil disobedience in a nearly just society when laws or policies 'clearly' and 'substantially' violate his first principle of justice protecting equal basic liberties and/or the principle of fair equality of opportunity (Rawls, 1972: 372). These kinds of injustices are regarded by Rawls as sufficiently serious to override our duty to obey the law. The reason is that the principle of equal liberty 'defines the common status of equal citizenship in a constitutional regime and lies at the basis of the political order' (Rawls, 1972: 373). Whilst Rawls concedes that there may be cases where it is not easy to see whether the principle of equal liberty has been violated, he says that it will 'often be clear' when basic liberties are not being

⁴ As indicated in my comments in the introduction. I do not want to rely on any concept of duty or obligation to obey the law given philosophical controversy over these issues (see above, pp. 15-19). For criticism of Rawls' defence of a natural duty to obey the law see Simmons (1979) 143-156 and Dworkin (1986) 193. Even if there are problems with the idea or concept of a natural duty, the substance of Rawls' arguments about compliance with laws seems to me to be sound: the justice of the basic structure of society and of its laws are surely significant variables in deciding whether or not one has any moral reason to obey or disobey the law.

respected. He says, 'when certain minorities are denied the right to vote or to hold office, or to own property and to move from place to place, or when certain religious groups are repressed and others denied various opportunities, these injustices may be obvious to all' (Rawls, 1972: 372).⁵

Rawls' theory of civil disobedience argues that the best basis for justified dissent is clear and substantial injustices that should be clear to all. Recognising the kinds of injustices he cites above 'does not presuppose an informed examination of institutional effects' (Rawls, 1972: 372). Rawls does not think that civil disobedience is a justifiable response to violations of the difference principle. As mentioned above, the difference principle pertains to equitable distributions of economic resources. According to Rawls it is much harder to ascertain whether or not the difference principle has been violated than the equal liberty principle, due to the need to refer to complex statistical information and theoretical speculations. In circumstances of perceived economic injustice civil disobedience is not an appropriate response because, 'the appeal to the public conception of justice is not sufficiently clear' (Rawls, 1972: 372). Moreover, Rawls hopes that any political process which respects the first principle of justice will allow institutional challenges to perceived economic injustices, and ensure that the latter, while possibly being 'persistent' and 'significant', will not get out of hand (Rawls, 1972: 373).

⁵ As a gloss on this first condition of civil disobedience, Rawls offers two more constraints. First citizens should exhaust other avenues of legal contestation and protest before embarking on civil disobedience, and second, citizens should ensure that their actions are proportionate and not likely to severely threaten the stability of a 'nearly just' society. In the remainder of this chapter I focus purely on the first condition of civil disobedience, relating to the laws and policies citizens can legitimately oppose through civil disobedience.

(2) Rawls' theory of civil disobedience has been the target of much criticism since its publication (e.g. Barry, 1973: 151-153; Singer, 1973: 84-92; Pateman, 1979: 58, 79; Greenawalt, 1989: 230-235; Cohen and Arato, 1992: 568-577). Whilst some of this criticism is justified it is worthwhile to reflect on the strengths of the theory as an account of when civil disobedience becomes justified in a constitutional democracy.⁶ The strength I am thinking of here is the appeal that Rawls makes to the intuition that, in a democratic community, one should endeavour to justify one's actions in the light of reasons that other members of that community might be able to accept as valid, especially when one's actions do or might have some impact on other citizens or the stability of the democratic community. This idea has become influential in recent accounts of deliberative democracy, particularly those that rely on some notion of 'public reason' through which citizens discuss and decide important political problems (Rawls, 1999a; Cohen, 1997a; Cohen 1997b). I want to briefly suggest why providing public reasons in defence of civil disobedience contributes significantly to a robust justification of civil disobedience within a constitutional democracy.

Civil disobedience in a constitutional democracy confronts political theory and political practice as a moral problem for at least two reasons. Firstly, citizens in these societies generally (but not universally) comply with the law, and there is

⁶ Rawls often refers to his account of civil disobedience as a 'constitutional theory of civil disobedience', and speaks about the importance of explaining 'the role of civil disobedience within a constitutional system' (Rawls, 1972: 363).

general recognition that such compliance helps guarantee a level of social co-ordination that might not be possible otherwise. Secondly, citizens in these societies generally believe that there are principled reasons to comply with the law, due to its creation by democratic means and its respect for constitutional or common law rights.⁷

These two reasons reflect a conception of law found in the work of writers such as Jürgen Habermas and John Rawls. According to Habermas, law has two characteristics in constitutional democracies. On the one hand it has a functional role to play in facilitating social co-ordination and stabilising expectations: citizens go about their daily business, form and pursue life-plans, in the expectation that other persons will generally respect legal norms governing conduct. On the other hand it has a moral dimension, which means that citizens do not generally comply with the law just because it stabilises society but also because the law *deserves* to be obeyed due to its moral legitimacy (Habermas, 1996: ch. 1). To use Rawls' terminology, the law supplies 'stability for the right reasons', which means that any stable ordering of society via law is only legitimate provided the law embodies certain moral principles (Rawls, 1996: 390). This understanding of the place of law in a constitutional democracy sets up the problem of civil disobedience: when disobeying the law citizens will be

⁷ To clarify this last point: I am suggesting that respect for law derives both from considerations about the democratic means of its production (e.g. we have reasons to comply with the law because we are the authors of the law) and its rights respecting character (e.g. we have reasons to comply with the law because it generally secures and respects our rights). I make no claim here about how these two reasons are accounted for or weighed in an overall theory of law or politics. I am sympathetic to the accounts of rights and democracy presented in both Rawls (1996) 408-421 and Habermas (1996) 118-131.

asked to account for their actions given the role of law in generally securing 'stability for the right reasons'.

One of the advantages of Rawls' method of constructing justifications for civil disobedience is that it suggests a persuasive means for citizens to justify illegal action in societies where laws aim to provide stability and some degree of justice. This can be seen in the importance Rawls places on civilly disobedient citizens appealing to the public political principles implicit in a written or unwritten constitution, which lend law its moral legitimacy. According to this account, civil disobedience becomes politically justifiable when the normal moral or political reasons we have for obeying the law, in Rawls' case that it is sufficiently just, do not apply in particular circumstances.

If we think of this in terms of the account of law presented above, then we can see how Rawls' method of justification provides citizens with a response to potential and actual critics. Against those who complain that the civilly disobedient citizen ignores the binding power of law despite the fact that it facilitates stability for the right reasons, the citizen can claim that in this particular case, when a law or policy violates Rawls' principles of equal liberty and/or fair equality of opportunity, stability is *not* being facilitated for the right reasons. When civilly disobedient citizens advance this claim, they challenge the binding power of law by claiming that at least one of the two reasons we have for complying with it, that it is sufficiently in harmony with public political principles, does not apply in this particular instance. Whilst not necessarily

eradicating any argument in favour of compliance, this at least weakens the case for compliance and opens up the possibility that counter arguments might outweigh the case for compliance.

In this way, those engaged in civil disobedience attempt to justify their actions in ways that are in principle acceptable to others, by appealing to public political principles generally accepted within the democratic community. According to Rawls:

Civil disobedience is a political act not only in the sense that it is addressed to the majority that holds political power, but also because it is an act guided and justified by political principles, that is, by the principles of justice which regulate the constitution and social institutions generally. In justifying civil disobedience one does not appeal to principles of personal morality or to religious doctrines, though these may coincide with and support one's claims; and it goes without saying that civil disobedience cannot be grounded solely on group or self-interest. Instead one invokes the commonly shared conception of justice that underlies the political order. (Rawls, 1972: 365)

According to Rawls, appealing to public political principles is what makes civil disobedience a *public* act – in that it is amenable to some kind of publicly acceptable justification. The act is public because it invokes public political principles that all can, in principle, accept: in a nearly just society regulated by

Rawls' two principles of justice then a case for disobedience based on the violation of those public political principles can be readily understood. Given that the principles set the fair terms of social co-operation, then it is reasonable for those who believe that the terms are being violated to refuse to co-operate with society in the way they otherwise would – for instance, by not complying with the law. For this reason I think Rawls' theory has great merit. Its method of justification foregrounds the idea that the actions of citizens within a democratic community should in principle be defended in public terms, which other members of that society have reason to accept.

This defence of Rawls' method should be qualified, however. Rawls may have good reasons for constructing public justifications of civil disobedience from the normative resources of a nearly just constitutional regime, but whether or not he provides a *definitive* account of those normative resources is an open question. Rawls certainly provides a comprehensive interpretation and defence of the moral dimension of law in a constitutional regime, which foregrounds the priority of justice over and above utility or perfectionism. Foregrounding justice in this way certainly speaks to convictions about the importance of safeguarding basic liberties through constitutional rights, a practice that has gradually emerged throughout the history of most modern nation states. But whilst justice certainly figures in most normative defences of law and political power, it is striking that the idea of *democratic legitimacy* finds only a minor role in *A Theory of Justice* (Cohen and Arato, 1992: 574; Habermas, 1998: 69). When it comes to using the normative resources of a modern constitutional democracy to construct

justifications for civil disobedience, then it could be that democratic arguments might prove as efficacious as rights-based arguments. This idea will be picked up later in the essay.

(3) One of the criticisms sometimes made of Rawls' theory is that it risks being irrelevant to actual social and political contexts (Singer, 1973: 88-89). This criticism derives from the idea that Rawls limits his theory to a 'nearly just' society. It is certainly the case that Rawls' method of justifying civil disobedience does not supply us with a generalisable theory applicable to *all* social and political contexts. However, this does not necessarily mean that the theory cannot be applied to discussions of civil disobedience in actual constitutional democracies. I argue that it can be so applied by reflecting on the similarities between the idea of a nearly just state and actual constitutional regimes, and by assessing the theory of civil disobedience in the light of actual protest campaigns carried out within constitutional democracies in recent times.

Rawls' insistence that his theory applies to a 'nearly just' regime creates the impression that it is not designed for 'real world' conditions. It may even create the impression that the theory cannot apply to actual constitutional democracies, as it is not immediately obvious that these democracies display the characteristics of a 'nearly just' regime. In fact, several actual constitutional democracies *do* share some important characteristics with nearly just regimes: for instance a written or unwritten constitution (Rawls, 1972: 353, 386), and some form of democratic government (382). On Rawls' understanding a nearly just regime

would be one that had a just constitution protecting the basic liberties, and democratic procedures such as free and regular elections. Despite the presence of these institutions, such a society would only be 'nearly' just (i.e. not 'perfectly' just) if it still tolerated 'serious violations of justice' (363), for instance through passing or maintaining unjust laws and policies. The nearly just regime for which Rawls designs his theory of civil disobedience, then, is not so far removed from the constitutional democracies that we are currently familiar with.

Some might balk at the suggestion that a state can qualify as 'nearly just' purely by virtue of having a constitution and formal democratic procedures, given the level of injustice that might feasibly be compatible with such a state of affairs (Barry, 1973: 141). Arguably Rawls' use of terminology is unfortunate, as it suggests that 'serious violations of justice' permitted by a nearly just regime are in some sense outweighed by a just basic structure. I do not want to defend Rawls' use of the expression 'nearly just', only to point out that his theory has some relevance to actual constitutional democracies because they share the features of a 'nearly just' state.

A more serious difficulty is Rawls' claim that 'nearly just' regimes are characterised by acceptance of the principles of justice (Rawls, 1972: 382). The claim that actual constitutional democracies have this characteristic might seem contentious. If we think that actual democracies do not generally accept Rawls' principles, then this might limit the practical application of his theory of civil

disobedience, because he assumes that the wisdom of civil disobedience becomes 'highly problematic' in societies that lack a general 'sense of justice' (386).⁸

It is difficult to claim that any actual constitutional democracy displays the kind of comprehensive allegiance to Rawls' conception of justice characteristic of a nearly just regime. For instance, it is difficult to claim at current that any society *widely* accepts the difference principle as a norm of distributive justice. However, I think Rawls would be wrong to assume that there needs to be a society-wide acceptance of his conception of justice to make justice based civil disobedience sensible and reasonable. It is surely enough that there is a general recognition and acknowledgement of some core features of his conception of justice, such as the privileged status of equal basic liberties.⁹ These core features are the 'familiar ideas' that can be found in the 'public political culture of a democratic society' and then 'worked up into a conception of justice' (Rawls, 2001: 5). For civilly disobedient citizens in democratic communities like the United States or European countries, an appeal to something like Rawls' first principle of justice would carry great public weight. This is because the kind of basic liberties that the principle protects are part of the public political culture and traditions of those communities, either protected through written constitutions or informal common law practices. A key litmus test for the

⁸ His reason is that in a society without a general sense of justice, civilly disobedient citizens might fall prey to 'repressive measures' at the hands of the 'majority' (Rawls, 1972: 387).

⁹ Rawls himself suggests that, in order to demonstrate that the theory of civil disobedience is 'plausible' (Rawls, 1972: 386), one can allow for 'considerable differences in citizens' conceptions of justice provided that these conceptions lead to similar political judgements' (387). See also Sabl (2001) 312.

binding power of law in these societies is the extent to which the law respects the rights and liberties of its citizens.

As a final thought, the relevance of Rawls' theory of civil disobedience can also be supported through reflecting on actual protest campaigns carried out within constitutional democracies. In particular, Rawls' theory should be seen against the backdrop of prominent campaigns of civil disobedience carried out in America throughout the period leading up to the publication of *A Theory of Justice*.

The Civil Rights Movement and the anti-Vietnam war movement engaged in frequent acts of civil disobedience as part of their overall protest repertoire. The former engaged in activities such as sit-ins at segregated lunch counters, demonstrating and parading without permits, and so-called 'freedom rides' across segregated states; the latter engaged in sit-ins in universities, the burning of draft cards and illegal street demonstrations. The concerns raised by these two movements were diverse, reflecting differences in political beliefs between persons within each movement. Despite this, it is plausible to suggest that both movements were, to a certain extent, concerned with issues of basic liberties. This is easily seen in relation to the Civil Rights Movement, whose central platform was, initially at least, the removal of political and legal obstacles to a full exercise of basic liberties for the black population. Whilst the anti-Vietnam war movement contained a range of radical and reformist ideas, common themes running through the public discourse prompted by the movement related to the

constitutional status of the war, and the supposed violation of basic liberties caused by alleged irregular application of the draft (Arendt, 1969: 97-98; Dworkin, 1978: 208-209).

Seen against this political and social backdrop, Rawls' theory can be seen as a response to practical concerns and issues raised by actual protest movements. The public question raised by the civil disobedience campaigns throughout that time in American society was: to what extent is a citizen morally entitled to disobey the law? Rawls' theory constitutes an answer to that question by placing the idea of basic liberties at the heart of the controversy.

The idea that citizens may justifiably engage in civil disobedience against laws that violate rights clearly resonates, at least to some degree, with the campaigns of that time. Participants in and supporters of these movements felt that their reasons to comply with the law either weaken or disappear in the light of clear and substantial violations of basic liberties. Such violations were perhaps more keenly felt in the American context precisely because the ideas of basic liberties figured so prominently in American political culture, as manifested in the constitution and the public discourses surrounding the interpretation of the constitution.¹⁰ Rawls' theory could have been employed as a justification for civil disobedience by groups engaged in these movements, given that the focus

¹⁰Arendt, for instance, speaks of the historical tragedy of America's refusal to realise the '*consensus universalis*', manifested in the refusal to acknowledge all American citizens as equal under the constitution (Arendt, 1969: 89).

of their protest were laws and policies that violated the idea of equal basic liberties for all citizens.

Once again, the defence of the relevance of Rawls' theory offered here should be qualified a little. I defended the relevance of the theory because it is designed for a 'nearly just' context similar to the political reality of actual constitutional democracies, and because it resonates with prominent campaigns of civil disobedience carried out in actual constitutional democracies. However, just because Rawls' theory was particularly relevant to protest campaigns carried out over thirty years ago, this does not mean that other subsequent protest campaigns in actually existing democracies might not raise issues and concerns that should be taken on board by a theory of civil disobedience. It could be that campaigns carried out recently in actual constitutional democracies are not necessarily justifiable according to the terms of Rawls theory, which raises the question of whether or not we should regard them as unjustifiable, or revise our theory so that we can incorporate them within it.¹¹

To summarise: in this section I have outlined Rawls' theory of civil disobedience and provided a qualified defence of some of its assertions. Themes introduced in this section will be picked up in the remainder of this chapter and the rest of the essay. In the next section I move from a sympathetic commentary to a more critical approach to Rawls' theory.

¹¹ Rawls acknowledges this possibility when he admits that other grounds for justified civil disobedience than those suggested by his theory might be forthcoming (Rawls, 1972: 364).

II. Civil disobedience and the constitutional testing of law

In this section I want to provide a brief discussion of an internal problem with Rawls' 'constitutional theory of civil disobedience'. I characterise this problem as 'internal' to the theory, because if it cannot be resolved it threatens the coherence of the theory as an account of justified civil disobedience. Put simply, the problem for Rawls is that although he wants to distinguish between justified civil disobedience and the constitutional testing of the law, it is not altogether clear that he succeeds in doing so. This is because, for Rawls, both justified civil disobedience and constitutional testing are a response to 'clear' and 'substantial' injustices. In the first part of this section I elaborate this problem in more depth. In the second part I reflect on why the problem matters for approaches to civil disobedience, like Rawls', that make an appeal to basic rights or constitutional principles a mandatory part of its justification. In the third part, I consider some potential responses to this problem. In particular, I suggest that the problem arises partly through Rawls' somewhat static notion of civil disobedience as a defensive response to violations of basic liberties that are already publicly recognised and given constitutional protection.

(1) In the course of elaborating his theory of civil disobedience, Rawls declares that a 'civilly disobedient act is indeed thought to be contrary to law, at least in the sense that those engaged in it are not simply presenting a test case for a constitutional decision' (Rawls, 1972: 365). Initially I interrogate the supposed

distinction between justified civil disobedience and the constitutional testing of particular laws.

Civil disobedience is defined as a situation where citizens protest against a particular law or policy that clearly and substantially violates the equal liberty principle or the principle of fair equality of opportunity. As elaborated in the last section, the idea that justified civil disobedience is a response to *clear* and *substantial* violations is a crucial part of Rawls' argument. It is partly because these injustices are clear and substantial, meaning that they are fairly straightforward to recognise, that they can serve as a robust public justification for civil disobedience. When citizens engage in civil disobedience they are appealing to the 'sense of justice' of the majority, in order to persuade the majority to acknowledge and rectify a clear and serious violation of the public political principles that set the fair terms for social co-operation.

Constitutional testing is defined as a situation where citizens protest against a particular law or policy with a view to persuading the democratic majority and the relevant judicial authority that the law or policy in question is unconstitutional (Rawls, 1972: 365). Rawls does not discuss the kind of laws and policies that might fall foul of this charge. Presumably the kind of laws and policies that might be the subject of a constitutional challenge are those that are thought to clearly and substantially violate procedural or substantive norms set out in the society's written constitution. For instance, a law might be challenged on the grounds that certain procedural requirements were violated in its

enactment, or a law might be challenged on the grounds that it violates substantive moral principles given legal recognition in the constitution, such as basic rights.

The potential problem here is fairly straightforward to identify. In both justified civil disobedience and constitutional testing the *same* public political principles appear to be in play. In justified civil disobedience citizens respond to clear and substantial violations of the public political principles that regulate the society's main institutions. In constitutional testing citizens respond to clear and substantial violations of the *very same* public political principles, provided those principles are given some kind of legal recognition. It is fairly clear from other parts of Rawls' book that he does envisage at least some of his principles of justice being given some sort of constitutional guarantee, in order to protect basic liberties from tyrannical democratic majorities:

The liberties of equal citizenship must be incorporated into and protected by the constitution. These liberties include those of liberty and conscience and freedom of thought, liberty of the person, and equal political rights. The political system, which I assume to be some form of constitutional democracy, would not be a just procedure if it did not embody these liberties...Statutes must satisfy not only the principles of justice but whatever limits are laid down in the constitution. (Rawls, 1972: 197-198)

Rawls' theory advocates a high degree of legal protection for his principles of justice, especially the equal liberty principle. So it seems that if citizens disobey laws on the grounds that the equal liberty principle is being violated, then they could also legitimately claim that the law in question is unconstitutional. This blurring of the boundary between justified civil disobedience and constitutional testing is illustrated by reflecting again on the kinds of injustices that Rawls cites as appropriate subjects of civil disobedience. Those injustices are: 'when certain minorities are denied the right to vote or to hold office, or to own property and to move from place to place, or when certain religious groups are repressed and others denied various opportunities' (Rawls, 1972: 372). All of these cases are examples of laws and policies that not only clearly and substantially violate public political principles, but also clearly violate, on Rawls' own description of the contents of a constitution, the public political principles that are given legal protection.¹²

¹² There is some ambiguity over the constitutional status of the principle of fair equality of opportunity. In *Political Liberalism* Rawls claims that whilst the first principle of justice is a constitutional essential, the difference principle and the principle of fair equality of opportunity are not (Rawls, 1996: 228-229). However, he does say that 'some principle of opportunity is surely such an essential, for example a principle requiring freedom of movement and free choice of occupation' (Rawls, 1996: 228). There is some overlap between whatever principle of opportunity is made a constitutional essential and the principle of fair equality of opportunity. Frank Michelman interprets Rawls as saying that *formal* equality of opportunity is a constitutional essential – allowing for freedom of movement, free choice of occupation and freedom from discrimination in education and employment (Michelman, 2003: 402-403). These ideas are also covered by fair equality of opportunity, but this principle also includes the demand that public offices and social positions not just be open in the formal sense but also that all persons should have a fair chance of attaining them – perhaps requiring a minimum degree of economic redistribution (Rawls, 2001: 43). This overlap is important for civil disobedience, as this form of protest becomes potentially justifiable only in the context of 'blatant' violations of the principle of fair equality of opportunity (and, of course, violations of the first principle). It might be reasonable to suggest that the kind of blatant violations of the fair equality of opportunity principle that might justify civil disobedience are violations of *formal* opportunity, which *are* constitutional essentials. This interpretation can be supported by remembering Rawls' tendency to foreground violations of formal freedoms as a basis for justified civil disobedience, and his uneasiness with economic injustices as a basis for justified civil disobedience (Rawls, 1972: 372). Unfortunately Rawls does not specify the kinds of blatant violations of fair opportunity that might justify civil disobedience, so I am not sure whether or not it escapes the

According to Rawls, one way in which constitutional testing and justified civil disobedience can be distinguished is that in the former case citizens are supposed to accept a court's decision about the constitutional claim, whereas in the latter case citizens need not accept a court's decision as final and can continue to protest the law as unjust. He says, 'those who use civil disobedience to protest unjust laws are not prepared to desist should the courts eventually disagree with them, however pleased they may have been with the opposite decision' (Rawls, 1972: 365).

Intuitively this seems a plausible way of distinguishing between constitutional testing and justified civil disobedience. However, after reflection it appears less compelling. Given that citizens are protesting clear and substantial violations of (constitutional) public political principles, and given that such violations should presumably be prevented through constitutional mechanisms (for instance judicial review) it is difficult to see why these citizens should distinguish between civil disobedience and constitutional testing in the way Rawls suggests they should. If a citizen breaks a law because she believes that it clearly violates a relevant public political principle (for instance the equal liberty principle) and if she knows that such a clear violation can be couched in constitutional terms (for instance by claiming that the law violates a constitutional guaranteed basic liberty like freedom of speech) then why should she accept the judgement of a

charge of slipping into constitutional testing. Arguably the usefulness of the fair equality of opportunity principle as part of a justification of civil disobedience can be contested, given the difficulty in ascertaining the kind of violations that create the conditions for justified civil disobedience.

court as definitive? In these circumstances, the citizen might be entitled to believe that the court has made a mistake, or is wrong about the constitutional claim under consideration, perhaps because of the same political and social contexts that presumably lead to the injustice being passed as law in the first place (for instance, misinformation, illegitimate preferences of the majority, bias within existing institutions). A reasonable response in these circumstances would be for the citizen to continue campaigning, through violating the allegedly unconstitutional law if necessary, in order to persuade the court to reconsider its judgement. Constitution testing need not necessarily stop after one legal decision, even after the decision of the highest legal authority.

In order to substantiate the claim that Rawls does not adequately distinguish between justified civil disobedience and constitutional testing, it helps to refer to other approaches to civil disobedience that endorse similar normative conclusions but are more aware of the slippage between this kind of civil disobedience and constitutional testing. In a recent article, Joxerramon Bengoetxea and Juan Ignacio Ugartemendia defend a view of civil disobedience as 'constitutional patriotism'. Like Rawls they argue that justified civil disobedience involves 'an appeal to the constitution – namely democracy, the rule of law and fundamental rights' (Bengoetxea and Ugartemendia, 1997: 437). Unlike Rawls they are explicit that this kind of civil disobedience involves protesters not just entering into a political dialogue with the majority of the community about the best interpretation of public political principles, but also a

legal dialogue with judicial institutions about the proper interpretation of constitutional principles.

Likewise, Ronald Dworkin defends civil disobedience as a response to violations of basic rights that have been given constitutional recognition. Again, unlike Rawls, he is explicit that this involves protesters entering into ongoing conversations about the best *legal interpretation* of constitutionally recognised moral principles. Dworkin is explicit in his belief that citizens are entitled to act on their considered and reasonable view of what the law is *even after* the highest legal authority has ruled against them (Dworkin, 1978: 214). According to Dworkin, when citizens engage in civil disobedience in response to violations of public political principles that have constitutional standing, they are also engaged in a process of testing the constitutional status of those laws, and they are entitled to carry on testing the laws even after a court has ruled against them.

At this point I want to clarify the sense in which this constitutes a *criticism* of Rawls' theory. I do not suggest that interpreting some acts of justified civil disobedience as constitutional testing is necessarily a bad thing. The arguments of Bengoetxea and Ugartemendia and Ronald Dworkin, for instance, illustrate the potential for moving civil disobedience into the judicial arena by sketching out the reasons a court might have for not prosecuting protesters or passing lenient sentences. Rather, I take this as a criticism because Rawls *wants* to distinguish between justified civil disobedience and constitutional testing. He explicitly says that 'civil disobedience has been defined so that it falls between

legal protest and the raising of test cases on the one side, and conscientious refusal and the various forms of resistance on the other' (Rawls, 1972: 363). Even if this is true in terms of the way Rawls *defines* these forms of protest, the contrast between civil disobedience and constitution testing breaks down after Rawls elaborates his *justification* of civil disobedience. Because both are responses to violations of public political principles that have constitutional standing it is difficult to see where any real difference between them resides.

(2) Even though Rawls does not adequately distinguish between justified civil disobedience and constitutional testing, it is worth asking whether or not this really matters for the kind of theory of civil disobedience he develops. The reason it does matter is that discussions of this kind challenge the way Rawls and the rest of us generally understand the idea and practice of civil disobedience. In particular, these questions challenge the perception of civil disobedience as a form of protest that demonstrates outright disobedience to legal and political authority through a willingness to engage in *illegal* actions. On the one hand, the person engaged in civil disobedience might not have to interpret his or her actions as illegal – in violating a clearly and substantially unjust law he or she can reasonably claim not to be acting illegally. On the other hand, it challenges the sense in which other citizens regard the civilly disobedient citizen – we see that the citizen has not set out to break the law but to challenge the constitutional status of a law.

From the perspective of the person engaged in an act of what looks like civil disobedience against a clearly and substantially unjust law, it is unlikely that she would happily consent to a description of her act as clearly illegal. If a person is protesting against the kind of injustices that Rawls recommends she can through civil disobedience, for instance denial of the right to vote for minorities, and if that person knows that these kinds of injustices are normally prevented through constitutional mechanisms, for instance judicial review, then it is unlikely that the person will regard her act as illegal. He or she might concede that a symbolic act of protest might involve technically illegality, but he or she will hope that a competent judge will, after assessing the relevant legal and moral issues, side with him or her and declare the law in question unconstitutional and hence invalid.

As mentioned above, this is the kind of situation that Ronald Dworkin tends to focus on in his discussions of civil disobedience. Dworkin points out that legal constitutions like the one found in the United States 'inject an extraordinary amount of our political morality into the issue of whether a law is valid' (Dworkin, 1978: 215). Given this fact about legal practice in America, whenever someone reasonably and sincerely believes that a law violates public political principles such as Rawls' equal liberty principle, it is likely that some kind of constitutional challenge might be made to that particular law as well. According to Dworkin 'a citizen's allegiance is to the law, not to any particular person's view of what the law is, and he does not behave unfairly so long as he proceeds on his own considered and reasonable view of what the law requires' (Dworkin,

1978: 214). The significance of this argument is that when a citizen violates a law because he or she believes it to be clearly and substantially unjust, it is also reasonable for him or her to believe that the law is unconstitutional, even if the highest court in the land disagrees. At least from that person's perspective, no genuine illegal action is carried out.¹³

From the perspective of those *evaluating* the illegal action, for instance judicial actors or other citizens, things are a little more complex. These other citizens might reasonably believe that the protester is *wrong* in his belief that a law is clearly and substantially unjust and hence of dubious constitutional standing. Furthermore, they might believe that someone with a controversial interpretation of constitutional law is acting frivolously in expecting the courts and other citizens to accept his or her interpretation as correct (Greenawalt, 1989: 228). It might seem from the perspective of those evaluators that the illegality of the action is fairly easy to demonstrate, given their own superior reading of the constitution. Does this mean that the clear illegality of civil disobedience is preserved, notwithstanding the judgement of the protester?

Dworkin would suggest not. According to Dworkin, the judgement of the person engaged in civil disobedience should influence our own appraisal of what he or she is doing. If someone does believe that the law he or she opposes is

¹³ T. R. S. Allan makes a similar point in relation to Rawls' theory of civil disobedience: 'Where the dissident [*sic*] appeals to principles of political morality which he claims underlie and inform the constitutional order itself, it is particularly plain that we misdescribe his dissent as disobedience to law. He denies the validity of the purported law on the ground that it is inconsistent with the constitution, properly understood' (Allan, 1996: 107).

unconstitutional, then this should impact on our own and a court's view of what the protester is doing. Dworkin claims that the morality injected into the law through constitutional rights means that there will be numerous situations where the constitutional status of a particular law is simply unclear. Dworkin refers to these cases as 'dubious' laws, where strong reasons argue both for a law's constitutional and unconstitutional status. In these situations, the wider citizenry and the courts should avoid advocating prosecution or harsh sentences, and find a legal niche for the apparent 'civil disobedience'. This is both because doing so treats protesters *fairly*, given that protesters are not flouting the law but acting on their own interpretation of what the law is, and because doing so benefits the legal community, given that these test cases allow a chance for public reflection on the best legal interpretation of the constitution.¹⁴

In summary: When the distinction between justified civil disobedience and constitutional testing of the law is blurred, the sense in which civil disobedience is a clearly illegal act becomes harder to see. The role that public political principles play in justifying civil disobedience and constitutionally validating law suggests a muddying of the waters between illegal and legal activity. This is particularly so when civil disobedience is justified as a response to clear and substantial injustices, which should be plain for all to see, as in Rawls' theory. Given the magnitude of the injustices that create the conditions for justified civil

¹⁴ Dworkin's arguments are important because even if a citizen might be wrong in his or her belief about the injustice of the law, it may still not be fair or accurate to describe him or her as acting in a clearly illegal fashion. A qualification to this is that the belief of the citizen should at least be reasonable – Dworkin says that protesters cannot wholly ignore precedent or legal opinion about the constitutional status of laws. I spell out the idea of reasonable belief more fully in the next chapter.

disobedience, it is difficult to see why citizens engaged in such disobedience within a nearly just regime would not also seek to make a constitutional claim that the law they oppose is not just unjust but also invalid.

(3) I want to briefly discuss ways in which Rawls or those sympathetic to his theory of civil disobedience might avoid the conclusion that there is no firm distinction between justified acts of civil disobedience and the constitutional testing of the law.¹⁵ A more comprehensive answer to this question is developed in the next chapter. Here I briefly suggest that the distinction can be maintained by focusing on the possibility of indirect civil disobedience, which Rawls' theory allows for, and by dropping the condition that civil disobedience is only justified as a response to clear and substantial violations of the equal liberty principle and blatant violations of the principle of fair equality of opportunity.

The discussion above about the blurred boundaries between justified civil disobedience and the constitutional testing of the law presupposed that the clearly and substantially unjust law that protesters oppose is the same as the law that they actually violate. The reason why this presupposition has to hold is that in most constitutional democracies citizens can only test the constitutional standing of a law by violating it and seeking the judgement of a court over whether or not they can reasonably be prosecuted under that law. According to

¹⁵ As I suggest in the next chapter, at least one reason for seeking to retain a distinction between constitutional testing and justified civil disobedience is to respect the intuition that some acts of protest will be orientated not towards activating judicial checks on government, but building up support for new government law or policy. In this way, we can acknowledge the political aims of many acts of justified civil disobedience (Arendt, 1969 80-81).

Kent Greenawalt 'generally the validity of a criminal prohibition can be tested only by disobedience' (Greenawalt, 1989: 241ff; see also Carter, 1998: 108 and Kadish and Kadish, 1973).

Situations where citizens would violate laws in order to test their constitutional status were fairly common throughout the protest campaigns carried out by the American Civil Rights Movement. An example of this is *Peterson v. City of Greenville*.¹⁶ In this case, 10 black petitioners carried out a 'sit-in' at the white only counter of the Kress '5 & 10' in Greenville, South Carolina. Although the men were arrested and prosecuted under a state trespass statute after the storeowner had asked them to leave, the Supreme Court later reversed the convictions. Justice Warren decided that a city ordinance requiring segregation had effectively removed the decision to ask the petitioners to leave from the discretion of the store owner, and rendered the city, an agent of the state, directly involved. He concluded that as a result of the ordinance, the petitioners had not received the protection afforded them by the Fourteenth Amendment. According to Poner, 'this is an example of civil disobedience being tacitly approved of by the courts as a means of highlighting an invalid law.' (1968: 671)

Cases like *Peterson v. City of Greenville* vividly illustrate the shaky distinction between civil disobedience and constitutional testing. However, it will not always be the case that civil disobedience is carried out through violating the

¹⁶ 373 U.S. 244 (1963). The following discussion is taken from the more detailed exposition in Poner: 1968, 671-672.

'law' that the protesters want to challenge. Rawls makes room in his theory for what he calls 'indirect' civil disobedience where it is either impossible to violate the law one opposes or where it would be unwise to directly violate the law. According to Rawls, 'if the government enacts a vague and harsh statute against treason, it would not be appropriate to commit treason as a way of objecting to it, and in any event, the penalty may be far more than one should reasonably be ready to accept' (Rawls, 1972: 365). More familiar instances might be those where citizens break traffic laws or right of way laws to symbolically protest against government policy: for instance a military campaign or defence policy. The fact that Rawls' theory allows for indirect civil disobedience, where the law that one breaks is not necessarily the same as the law one opposes, suggests that there are at least some cases of justified civil disobedience that can clearly be delineated from constitutional testing.¹⁷

The argument from indirect civil disobedience partially rescues the distinction between justified civil disobedience and constitutional testing, but not wholly. The distinction is still blurred for cases of *direct* civil disobedience. Moreover, even if protesters engaged in indirect civil disobedience against a law or policy they believe to be unconstitutional, they might still reject the idea that they are genuinely engaged in deliberate disobedience to law. They might complain that circumstances prevent them from violating the law they believe to be seriously

¹⁷ As part of an overall critique of his tendency to flatten the boundary between justified civil disobedience and constitutional testing, Cohen and Arato criticise Ronald Dworkin for focusing on cases where protesters directly violate the laws they oppose. They say that this neglects 'perhaps the majority of acts of civil disobedience', which are indirect (Cohen and Arato, 1992: 580; see also Arendt, 1969: 55-56).

unjust and unconstitutional, *forcing* them to engage in illegal action that they would otherwise wish to avoid. This position has sometimes found its way into judicial arenas in the form of the *necessity* defence, though courts tend not to be receptive to it.¹⁸

A second way of rescuing the sense in which justified civil disobedience might be distinct from constitutional testing, and hence rescuing the sense in which civil disobedience constitutes genuine illegal disobedience, is to simply remove Rawls' condition pertaining to clear and substantial violations of public political principles. This might not entail severing the tie between justified civil disobedience and public political principles, but would entail a re-description of the relationship between the two. Political justifications for civil disobedience could be constructed in a Rawlsian spirit, without collapsing into constitutional testing, if we understood justified civil disobedience in the following way: citizens can justify civil disobedience if they reasonably believe that laws or policies violate basic liberties and/or if they seek to promote new rights and liberties through their actions.

At first glance this looks the same as Rawls' formulation but there is a difference. By inserting the clause that protesters can engage in civil disobedience against laws and policies in order to promote new rights and liberties, one introduces a dynamic element absent from Rawls' account. In

¹⁸ For a sympathetic account of necessity defences of indirect civil disobedience, and a critique of U.S. legal decisions that deny such a defence, see Cavallaro (1993).

Rawls' account basic liberties are exhausted by the liberties covered by the equal liberty principle, which are also given constitutional protection in a nearly just state. Civil disobedience is construed *defensively*, to use Cohen and Arato's term, as a response to violations of basic liberties that are already established through theoretical argument and constitutional law (Cohen and Arato, 1992: 574). Allowing that citizens might also engage in civil disobedience to promote new rights and liberties introduces the creative and dynamic idea that citizens might seek to *extend* and *develop* the corpus of basic liberties and constitutionally guaranteed rights. Protesters would acknowledge that the basic rights they are seeking to introduce are not currently recognised by the prevailing conception of justice or constitutional law, and so would not be testing the constitutional status of existing laws or policies. But, there is still a commitment to the values and currency of the prevailing conception of justice, namely the equal distribution of basic liberties. This idea will be pursued in the next chapter, which re-formulates Rawls' theory of civil disobedience along those lines.

III. Civil disobedience and the democratic character of the law

The criticism discussed above referred to an internal problem in Rawls' theory and questioned the coherence of his account of justified civil disobedience. In this section I discuss a normative criticism of Rawls' theory, namely that the conditions he sets for justified civil disobedience are too restrictive. If this criticism is sound then it should eventually lead to the same response as that to the internal criticism: namely that Rawls' restriction of justified civil

disobedience to clear and substantial violations of his equal liberty principle should be avoided. Therefore both criticisms can, I think, be seen as moving toward the same general outcome: expanding the circumstances where civil disobedience can be a justified course of action in a constitutional democracy. As before the argument pursued here is divided into three parts. First, prominent critics of the restrictions Rawls places on justified civil disobedience are discussed, in particular those who criticise Rawls for neglecting the democratic basis of civil disobedience. Second, this criticism is applied to Rawls' prohibition on economic injustices as a basis for justified civil disobedience, in order to bring out the weak grounds behind that restriction. Third the criticism is used to show how the relevance of Rawls' theory for discussions of civil disobedience in actual constitutional democracies, argued for above at I (3), might be undermined.

(1) In the first section of this chapter it was suggested that Rawls employed an interesting and productive method in constructing justifications for civil disobedience. In particular, the method of using the public political principles of contemporary constitutional systems as a resource for constructing justifications was defended because it provided the basis for a robust justification of civil disobedience. Citizens who engage in civil disobedience within Rawls' nearly just state have a good response to those who criticise them for engaging in illegal acts of protests. They can claim that their acts are justified because government law or policy is violating the public political principles that set the fair terms of social co-operation. However it was briefly suggested that whilst Rawls' method

for constructing public justifications may be interesting and appealing, it is not necessarily the case that he provides a full account of the normative dimension of a constitutional democracy. Therefore, he may also provide a restrictive account of the conditions for justified civil disobedience (see above, p. 39-40).

Several writers who have discussed Rawls' theory of civil disobedience have explored just this possibility, and concluded that he does provide a restrictive account of civil disobedience. What is interesting about these writers is that they accept Rawls' overall method of constructing justifications for civil disobedience. In particular, they accept the idea that justifications for civil disobedience should be gleaned from the normative dimension of a constitutional democracy. They accept that the best defence that civilly disobedient citizens within a constitutional democracy can offer is that the normal moral reasons citizens have for obeying the law do not apply, or apply with less force than they otherwise would. They depart from Rawls on his own interpretation and defence of the normative dimension of a constitutional democracy. In particular they claim that Rawls provides an underdeveloped account of the democratic process, and hence an inadequate account of how our duty to comply with the law is conditional on the law-making process being sufficiently democratic.

In *Democracy and Disobedience*, Peter Singer criticises Rawls for the restrictions he places on the circumstances where citizens can legitimately engage in civil disobedience. In particular he claims that Rawls is unjustified in arguing that civil disobedience can only be carried out in response to violations

of public political principles that are enshrined in his theory of justice. According to Singer, this turns the present conception of justice that regulates a nearly just society 'into a standard valid for all time'. He complains that 'we surely cannot rule out the possibility that in time [the conception of justice] may appear defective, not only in its application, but in the fundamentals of the conception itself' (Singer, 1973: 89). Singer suggests that civil disobedience should be seen as one of the ways in which citizens might extend, develop and challenge the present conception of justice, perhaps in the light of new social and political problems or circumstances that the conception is not equipped to respond to.

Singer also claims that Rawls unjustifiably excludes civil disobedience over moral issues and concerns that his conception of justice does not speak to. This means that for all those areas of morality that Rawls' theory of justice does not address, civil disobedience would not be permitted as a response to immoral actions by government or persons in society. Singer cites the example of animal cruelty, and claims that whilst Rawls acknowledges that cruelty to animals is wrong, the fact that this wrongness is not accounted for by his theory of justice means that no amount of animal cruelty would justify principled acts of civil disobedience (Singer, 1973: 90). Singer's alternative to Rawls is to defend civil disobedience as a plea for reconsideration on the part of a minority in society. Rather than defend civil disobedience on the grounds of justice, as Rawls does, he defends it as a contribution to democratic debate (Singer, 1973: 84-86).

Jean Cohen and Andrew Arato accept Rawls' argument that civil disobedience in a constitutional democracy can be a justified response to violations of basic liberties, but criticise him for the restrictions he places on justified civil disobedience. They re-articulate one of Singer's criticisms: that Rawls is insensitive to the role civil disobedience might play in expanding and developing the conception of justice that regulates a nearly just constitutional regime (Cohen and Arato, 1992: 575). They also provide a thoroughgoing critique of Rawls' exclusive focus on the idea of justice as the main political ideal underpinning the legitimacy of political power. According to them, this neglects the importance of political power being generated through inclusive and dynamic democratic processes, where representative law making bodies are receptive to the various opinions and associations active in civil society.

Cohen and Arato suggest that Rawls provides an etiolated justification of civil disobedience. The kind of political 'mistakes' that Rawls thinks might lead to justified illegal protest 'involve only violations of individual rights and not, for example, misunderstandings of popular will, inadequate representations of public opinion, or insufficient consideration of the relevant issues' (Cohen and Arato, 1992: 574). Rawls focuses only on injustices as a potential justification for civil disobedience, and neglects the place of breakdowns in the democratic process. Cohen and Arato offer an account of civil disobedience that seeks to incorporate the idea that civil disobedience is *not just* a response to violations of rights, but

also part of the process whereby groups in civil society can contribute to and extend democratic deliberation.¹⁹

The drift of these criticisms is clear. According to these authors Rawls neglects the democratic dimension of law, and the role democratic arguments might play in justifications of civil disobedience. Just like Rawls' defence of civil disobedience, justifications of civil disobedience based on democratic principles have public currency. If such a defence could be articulated, citizens could claim that when the law has been produced in an insufficiently democratic way, one of the reasons they have for complying with it does not obtain. Just as in Rawls' theory, citizens can appeal to public political principles, which are widely accepted as providing an account of why law should be obeyed. Unlike Rawls' theory, the range of public political principles is not limited to principles of justice, but extends to incorporate democratic norms. This intuition is developed later in the essay (see chapters 3-4 below).

(2) In this section I want to explore whether Rawls has reasons and resources for responding to the criticism that he neglects potential democratic justifications of civil disobedience. Singer and Cohen and Arato tend to suggest that Rawls' theory of justice as a whole is deficient in that it does not adequately account for the place of dynamic democratic practices within a just regime or nearly just regime. There is certainly some truth in this observation. Throughout *A Theory*

¹⁹ I provide a critique of Cohen and Arato's theory of civil disobedience in chapter 3, section III of this essay.

of Justice, Rawls focuses on the foundation and justification of basic liberties and distributive justice more than the democratic process.

However, this is only a partially fair reading of Rawls' theory. Rawls does defend the importance of establishing some kind of democratic process, based on the application of the equal liberty principle to the political process (Rawls, 1972: 221). In the first instance this leads to the familiar idea that all citizens should, according to a principle of equal participation, possess voting rights and rights to stand for political office. But Rawls also embarks on a potentially more radical discussion of the *fair value* of political liberty. The tenor of this discussion is that, for the purposes of political justice, it is not sufficient to guarantee formal political freedoms. The state must also ensure the fair value of the political liberties, which means that all citizens must be able to exercise an effective influence on the democratic process. It is at this point that Rawls might be able to construct justifications of civil disobedience based on democratic ideas. Civil disobedience might be justified as a response to violations of the fair value of the political liberties.

In order to substantiate this idea, it is necessary to explore further what Rawls means by the fair value of political liberties. He defines it initially as 'a fair opportunity to take part in and to influence the political process' (Rawls, 1972: 224). This is elaborated so that it incorporates: freedom of speech and assembly and liberty of thought and conscience; a public forum that is free and open to all; adequate means for citizens to be informed about political issues; and effective

opportunities for citizens to add alternative proposals to the agenda for political discussion (Rawls, 1972: 225). The dimensions of political liberty span from formal protection of political liberties to more substantive criteria designed to secure effective access to the political process.²⁰

Rawls illustrates the importance of achieving a sufficiently fair value for political liberty when he discusses the consequences of failure:

The liberties protected by the principle of participation lose much of their value whenever those who have greater private means are permitted to use their advantages to control the course of public debate. For eventually these inequalities will enable those better situated to exercise a larger influence over the development of legislation. In due time they are likely to acquire a preponderant weight in settling social questions, at least in regard to those matters upon which they normally agree, which is to say in regard to those things that support their favoured circumstances. (Rawls, 1972: 225)

This passage illustrates Rawls' keen awareness of the dangers attendant in tolerating gross inequalities in resources, particularly in relation to a fair and equitable democratic process. In order to guard against this threat, Rawls insists that 'in a society allowing private ownership of the means of production,

²⁰ Interestingly, much of what Rawls has to say about the question of the fair value of political liberties anticipates concerns of deliberative democrats, who wish to ensure a genuinely fair and equitable distribution of resources and/or capabilities as a precondition for robust democratic practices (Cohen, 1997a; Knight and Johnson, 1997).

property and wealth must be kept widely distributed and government monies provided on a regular basis to encourage free public discussion'. Moreover, political parties must be at least partially funded by tax revenues to ensure that they are sufficiently independent from private economic interests (Rawls, 225-226). Unusually given the generally abstract tone of Rawls' arguments in *A Theory of Justice*, Rawls then goes on to criticise actually existing constitutional governments for their historical failure to insure the fair value of political liberty. He says: 'disparities in the distribution of property and wealth that far exceed what is compatible with political equality have generally been tolerated by the legal system'. This results in a situation where 'political power rapidly accumulates and becomes unequal; and making use of the coercive apparatus of the state and its law, those who gain the advantages can often assure themselves of a favoured position' (Rawls, 1972: 226; see also Daniels, 1975b: 256-257).

These observations about the fair value of political liberty add a different complexion to the normative resources Rawls might draw upon to amend his theory of civil disobedience in the light of criticisms from the likes of Cohen and Arato. Because of the importance of securing the fair value of political liberty, and given the historical difficulty of achieving this, it seems reasonable to extend the theory of civil disobedience so that it incorporates as justified acts geared towards protesting the consequences of serious inequalities in political liberty. This extends Rawls' theory so that it does not just permit disobedience in the face of violations of basic liberties, but also in the face of evidence that the democratic process is being subverted in some way due to inequalities in the fair

value of political liberty.²¹ Circumstances where this case might be reasonably made are: when politically powerful actors are able to bias the direction and outcome of deliberation in their favour, or when less powerful members of society are unable to exercise any real influence over deliberation, as evidenced by a failure to get issues and concerns onto the deliberative agenda.

In general terms, concern for the fair value of political liberty should occasion Rawls to revise his prohibition on economic injustices as a basis for justified civil disobedience. Recall that Rawls does not believe that economic injustices are a suitable basis for a public justification of civil disobedience, partly because he supposes that provided the government guarantees the basic liberties protected by the first principle of justice, then other injustices should not 'get out of hand' (Rawls, 1972: 373). The idea here is that if basic liberties are protected, then citizens at least have some means to contest and criticise the prevalence of economic injustices. Reflections on Rawls' comments about the failure of actually existing political systems to guarantee the fair value of political liberties, however, seem to undercut this optimistic assessment. Rawls declares that 'economic inequities in the economic and social system may soon undermine whatever political equality might have existed under fortunate historical conditions.' According to this more sober assessment, 'universal suffrage is an

²¹ A brief exegetical point: since the publication of *A Theory of Justice*, Rawls explicitly stated that ensuring the fair value of the political liberties is part of the first principle of justice (Rawls, 1996: 327). If so, this means that the initial statement of civil disobedience might already include the idea that violations of the fair value of political liberties can form part of a justification of civil disobedience (although at no point in the theory of civil disobedience does Rawls suggest this). Including the fair value of the political liberties as part of the first principle of justice might be thought to raise difficult issues about their constitutional status (remember that the first principle is a constitutional essential). Is a judiciary charged with ensuring their fair value?

insufficient counterpoise; for when parties and elections are financed not by public funds but by private contributions, the political forum is so constrained by the wishes of the dominant interests that the basic measures needed to establish just constitutional rules are seldom seriously presented' (Rawls, 1972: 226).

The danger that economic injustices might seep into the political sphere, with the result that beneficiaries of existing inequalities might use their greater political power to frustrate political attempts to introduce more just policies, suggests that civil disobedience should be considered as at least potentially justified in these circumstances. Citizens engaged in it could reasonably claim that the fair terms of social co-operation are not being met, as powerful political actors are exploiting economic injustices to distort the democratic process.

I conclude, then, that Rawls does have normative resources within his theory of justice to respond to some of the concerns expressed by writers like Singer and Cohen and Arato. His concern for the fair value of political liberty should predispose him to accept as justified civil disobedience carried out in the face of unequal political power and influence in the democratic process, and civil disobedience carried out to protest the economic inequalities that facilitate such democratic distortions. This idea is explored in greater length and independently of Rawls' theory later in this essay (see chapter 4, below). It should be pointed out that incorporating the idea that civil disobedience can be a justified means of protesting the influence of unequal power on the democratic process might not

exhaust the democratic dimension of justified civil disobedience. Other ideas might also supply democratic reasons for citizens to disobey the law.

(3) It was suggested above that Rawls' account of justice contains ideas about democratic practices that could constructively be applied to justifications of civil disobedience. Rawls' concern for the fair value of political liberties should provide him with a strong reason for broadening the justification of civil disobedience. The final point I want to make in this chapter is that there is another reason why Rawls' theory should incorporate the various democratic concerns that might lead reasonable citizens to engage in civil disobedience. That reason is that in so doing Rawls would re-affirm the *relevance* of his theory for discussions of civil disobedience in actual constitutional democracies.

In section I part (3) I defended Rawls' theory of civil disobedience against the charge that it was irrelevant to political discussion within 'real world' conditions. I claimed that Rawls' theory was relevant firstly because of the similarities between 'nearly just' regimes and constitutional democracies, and secondly because it spoke to prominent campaigns of civil disobedience carried out within these constitutional democracies. However, the relevance of the theory was qualified. In particular, I suggested that new campaigns of civil disobedience within constitutional democracies might provoke reconsideration of some of the features of Rawls' theory of civil disobedience.

Protest campaigns carried out by groups within constitutional democracies since the publication of Rawls' *A Theory of Justice* have posed questions about the scope of the theory of civil disobedience contained within it. Throughout the last three decades social movements have engaged in protest action over a wide range of issues and concerns that do not fall within the range of Rawlsian justice. To list but a few examples, groups in civil society have recently campaigned over: concerns about the effect of human activity on the natural environment; concerns about the proliferation of nuclear weapons both during and after the Cold War; concerns about human cruelty to animals; concerns about third world debt; concerns about exploitative labour practices in third (and first) world countries; concerns about the erosion of public spaces and the power of corporate speech to colonise the public sphere; concerns about the influence of powerful economic actors over democratic deliberation and decisions; concerns about the imposition of neo-liberal economic policies on weak countries in need of external investment; concerns about devolution of power to unaccountable national and transnational bodies; concerns about the direction of United States foreign policy; and concerns about the erosion of traditional ways of life. It is difficult to envisage how anyone engaged in civil disobedience over these issues could justify their acts as responses to clear and substantial violations of equal liberty or fair equality of opportunity.

The emergence of these issues as inspirations for civil disobedience campaigns do not force Rawls or those who accept his theory of civil disobedience to revise the theory. However, without any engagement with at least some of the concerns

and issues raised by these kinds of protests, Rawls' theory of civil disobedience may appear static, unresponsive to new problems and situations, and hence less relevant than it perhaps was thirty years ago. In fact, many social movements protesting over these issues employ the rhetoric of democracy to justify their activities. In order that a Rawlsian theory of civil disobedience speak to these issues, it could offer views about the pedigree of these kinds of democratic justifications. Given that, as argued above, there are already reasons for Rawls to explore the democratic grounds of civil disobedience, this is both a possible and desirable debate to engage in.

Conclusion: Building on Rawls' constitutional theory of civil disobedience

In this chapter I have discussed one of the most influential theories of civil disobedience in contemporary political philosophy. I argued that whilst John Rawls' constitutional theory of civil disobedience was productive and interesting, as it stands it suffers from two defects. On the one hand it seems to flatten the distinction between justified civil disobedience and the constitutional testing of the law, thus undermining the sense in which we view civil disobedience as genuinely illegal disobedience to political authority. On the other hand it seems to provide an etiolated account of the full range of circumstances where civil disobedience might become a justifiable course of action in a constitutional democracy, particularly in its lack of attention to potential democratic grounds for dissent. Both these difficulties can be ameliorated by making one simple move: changing Rawls' condition that civil disobedience is *only* justified as a

response to clear and substantial violations of the equal liberty principle, and broadening the scope for justified civil disobedience in a constitutional regime.

In the following chapters I pursue this line of thought in relation to both criticisms. In the next chapter I provide a fuller account of how justified civil disobedience is at least analytically distinct from the constitutional testing of the law, by exploring further the idea that this form of dissent is justified by virtue of the reasonable belief of protesters that basic liberties are not being respected or recognised by existing laws. In the third and fourth chapters, I develop the idea that civil disobedience can be a justified response to perceived failings in democratic practices. In particular I develop some ideas touched upon in section III part 2, by exploring the relevance of recent ideas in deliberative democratic theory for the problem of justified civil disobedience in a constitutional democracy. The final destination of this essay should be an account of civil disobedience that builds upon Rawls' intuition that the best justification for illegal protest is derived from the public political principles that justify the exercise of political power, but which provides a more expansive conception of those principles and the way they impact on justifications of civil disobedience.

Chapter 2: Civil disobedience as a campaign for new basic rights

In the last chapter I introduced the idea that civil disobedience in a constitutional democracy might be justified in response to violations of public political principles that set the fair terms of social co-operation. John Rawls develops this idea in his 'constitutional' theory of civil disobedience, through discussing the kinds of violations of his principles of justice that might suffice to override our natural duty to obey just institutions. In this chapter I want to continue this investigation by defending a slightly different account of how civil disobedience might be justified. The account developed here stresses the pro-active role civil disobedience can play in extending and re-interpreting the existing store of basic liberties (henceforth rights)¹ in a constitutional democracy. If this account can be successfully defended then we should have a normatively attractive description of the relation between civil disobedience and basic rights, and a fuller account than Rawls provides of the distinction between justified civil disobedience and constitutional testing of laws.

In the first section I develop the idea introduced in the last chapter: that civil disobedience in a constitutional democracy can be justified when citizens reasonably believe that laws and policies violate basic rights or that the democratic community should acknowledge new rights. Like Rawls' theory, this

¹ I do not think there is a major difference between 'basic liberties' and 'basic rights'. Presumably both can describe an entitlement that citizens can expect the state to grant, and both can pertain to 'negative' freedoms from external coercion or harm and 'positive' freedoms to enjoy some good or resource (see Rawls' comments endorsing MacCallum's triadic concept of liberty, Rawls, 1972: 202). I prefer the term 'basic rights' simply because it is more widely used than 'basic liberties' in contemporary public debates within constitutional democracies.

approach forges a connection between justified civil disobedience and basic rights, but offers a slightly different account of that connection. For Rawls the connection between the two is that civil disobedience is a defensive response to clear and substantial violations of a set of clearly defined basic rights. The account developed here, by contrast, explores the way in which civil disobedience can *also* be a creative act intended to extend the range of basic rights that are currently recognised within a constitutional democracy, both in law and in influential texts such as Rawls' *A Theory of Justice*.² This idea is illustrated through referring to the development of person-centred environmental rights as a legitimate legal and moral category, and the role that popular protest played in that process. Emphasising the creative dimension of civil disobedience can be defended as normatively attractive, in that it demonstrates one of the many ways in which a society's conception of justice and system of rights can be developed and extended in the light of new problems and concerns. It also enables us to clarify the sense in which justified civil disobedience can be different from constitutional testing. The former, when understood as a campaign to *expand* the range of basic rights, involves trying to persuade the democratic community to introduce new laws or a change of policy. The latter, when understood as protesting violations of rights already accorded constitutional recognition, involves trying to persuade courts to strike down contested laws or legislation.

² I emphasise that my account does accept Rawls' idea that civil disobedience can be justified in response to serious violations of basic liberties. As ascertained in the last chapter, the possibility of indirect civil disobedience means that at least *some* acts of Rawlsian civil disobedience do not collapse into constitutional testing.

The rest of the chapter is devoted to a defence of this account of civil disobedience against three criticisms. The first responds to concerns about making the reasonable belief of the protester the relevant standard of justification for civil disobedience. In order to ward off fears that this makes the process of justifying civil disobedience too easy, the requirements of a belief sufficiently reasonable to justify civil disobedience will be enumerated. The second responds to concerns that the stability of a constitutional democracy might be threatened by a disposition to engage in justified civil disobedience. On the one hand, civil disobedience is not likely to lead to instability given built-in limitations to this form of protest. On the other hand, on the rare occasions that civil disobedience might threaten the stability of a constitutional state it is not necessarily obvious that, in such extraordinary circumstances, stability or the status quo should be preferred over activity geared towards making the state more just. The third responds to fears that the account of justified civil disobedience defended here will encourage protesters to conceal their real motive for breaking the law under the bogus cover of a rights claim. Whilst this fear can never be fully removed it can be reduced by pointing to the potentially high costs of engaging in civil disobedience, and the role of a critical public in smoking out bogus claims.

1. Civil disobedience and the dynamic nature of basic rights

In this section I want to defend the idea that civil disobedience in a constitutional democracy can be justified not just when citizens reasonably believe that laws and policies violate existing rights, but also as part of a campaign to promote new rights. First, this idea is developed through reference to a dynamic

conception of rights described by writers such as Jürgen Habermas and Joseph Raz. Second, this idea is substantiated through discussing the gradual development of environmental rights – person centred rights that guarantee for all citizens freedom from environmental harms and entitlement to environmental goods. Third, this idea is defended as a normatively rich account of the relation between civil disobedience and basic rights, and as a means by which a clear difference can be marked between justified civil disobedience and constitutional testing.

(1) According to John Rawls the justification of civil disobedience is restricted 'to serious infringements of the first principle of justice, the principle of equal liberty, and to blatant violations of the second part of the second principle, the principle of fair equality of opportunity' (Rawls, 1972: 372). It was suggested briefly in the last chapter that this is a somewhat static account of the relation between civil disobedience and basic rights (see above, pp. 60-61). The relationship is static because Rawls suggests that civil disobedience should be a response to clear violations of a set of basic liberties *already established* through his theory of justice and, in a nearly just society, given constitutional or common law recognition. Remember that the kinds of injustices that Rawls says are justifiable targets of civil disobedience involve clear violations of established rights such as the right to vote and liberty of conscience (Rawls, 1972: 372). On this conception, civil disobedience involves some sort of appeal to a system of rights already available as a resource for public political debate and argument. Moreover, the justification of civil disobedience that Rawls offers presupposes

that the aim of such protest is to defend an already established system of rights from violations inflicted by governments. Civil disobedience, then, is a means for citizens to protect themselves against infringements of their basic rights by government (Cohen and Arato, 1992: 574).

Commenting on this defence of civil disobedience Cohen and Arato criticise Rawls for his 'static conception of the function of civil disobedience'. They claim that, in Rawls' theory, 'questions about the conception of justice, about new kinds or new interpretations of rights, and about more and new kinds of participation have no place' (Cohen and Arato, 1992: 575). The suggestion is that in focusing on the defensive function of civil disobedience as a response to violations of already existing rights, Rawls downplays the potentially dynamic role civil disobedience can play in extending and developing an existing scheme of rights. This idea presupposes that a system of rights is rarely, if ever, complete or set in stone, but instead is in a fairly constant process of development, as new rights emerge as legally, morally and politically salient in the light of new problem situations and social contexts. One of the ways in which the need for new rights can be highlighted is through publicity generating campaigns, sometimes involving civil disobedience, carried out by groups within civil society.

If a theory were to take this function of civil disobedience on board, then the stringent requirement that civil disobedience is only justified in response to clear and substantial violations of established rights would have to be amended. In its

place would be the idea that citizens can offer justifications of their illegal actions, if they reasonably believe that either existing rights are violated, and/or if they reasonably believe that new rights should be acknowledged as salient and accorded some kind of legal recognition.

The idea that a system of rights is rarely, if ever, complete is fairly commonplace within many strands of political and legal theory. The idea that a system of rights is a dynamic system is suggested by Habermas. He says: 'the constitutional state does not represent a finished structure but a delicate and sensitive – above all fallible and revisable – enterprise, whose purpose is to realise the system of rights *anew* in changing circumstances, that is, to interpret the system of rights better, to institutionalise it more appropriately, and to draw out its contents more radically' (Habermas, 1996: 384). For Habermas, a system of rights must be receptive to 'changing circumstances' that might require a potentially radical re-interpretation of existing rights and perhaps the legal recognition of new rights. As an example, Habermas discusses the way in which concerns about new problem situations expressed by groups in civil society have lead to the creation of new rights. He says: 'the classification of rights has come to include not only cultural rights but also new kinds of civil rights for which feminist and ecological movements today struggle in particular' (Habermas, 1996: 77).

Joseph Raz also suggests that a system of rights is dynamic and changeable. Raz claims that rights are based on fundamental interests of persons, which constitute

sufficiently strong grounds for holding other persons to be under some kind of duty.³ Raz identifies two ways in which a system of rights can be dynamic. On the one hand 'a change of circumstances may lead to the creation of new duties based on [an] old right' (Raz, 1986: 171). He cites the example of how a right to political participation, in the context of a modern state with complex and occasionally closed bureaucracies, might give rise to a new duty on the part of the government to make its plans and proposals public and keep the democratic community informed about the basis and direction of policy. On the other hand a similar change in circumstances might mean that, in Raz's terminology, new 'derivative' rights are derived from established 'core' rights. Core rights are general or fundamental rights, such as the right to personal liberty, which are not grounded on other rights but instead are based upon some fundamental interest of the right holder, such as his or her interest in being free to act as he or she wishes. Derivative rights are more specific rights that are derived from the core right; Raz cites the somewhat idiosyncratic example of how a right to 'walk on one's hands' is derived from the core right to liberty (Raz, 1986: 169).⁴ To use the example considered above, the core right to political participation might lead to a derivative right to freedom of information, in the changed circumstances that Raz discusses (e.g. the emergence of complex and closed bureaucracies).⁵

³ I do not want to endorse Raz's theory of rights, but cite it as an example of how rights can be seen as dynamic and adaptable to changing circumstances.

⁴ Raz does not suggest circumstances where a new core right may emerge: it seems reasonable to speculate that as core rights are based on some fundamental interest of the rights holder, new core rights might emerge in the light of changing conceptions of those fundamental interests.

⁵ The idea of a right to information or a 'right to know' is an interesting example of a right that has emerged forcefully in recent times, but which initially was not recognised as fundamental to constitutional arrangements. Joseph Stiglitz points out that the new Thailand constitution endorses such a right, whereas more established constitutions such as the U.S. constitution, drafted with earlier systems of rights in mind, do not (Stiglitz: 2002: 131-132).

I do not propose to endorse or provide a systematic account of how new rights are generated, or how old rights are re-interpreted. I merely suggest that most systems of rights, in theory and in practice, have a dynamic character. This can be seen by reflecting on the historical emergence of new sets of rights throughout the last hundred years, in particular the emergence of labour rights, rights of family members, and environmental rights. These rights emerge as salient in the light of new problems and concerns that emerge throughout the history of constitutional democracies.

I take a closer look at the emergence of environmental rights in a moment. First I want to re-iterate briefly how this might impact on normative discussions of civil disobedience. According to Habermas 'the plebiscitary pressure of civil disobedience is often the last chance to correct errors in the process of the realisation of a legal order *or to set innovations in motion*' (my emphasis, Habermas, 1985: 104). Principled acts of civil disobedience may be an attempt to convince the state and wider citizenry to acknowledge the need for new rights. Initially this might be achieved through publicising the concerns that lead to the alleged need for the new rights, for instance concerns about bad labour practices. Then protesters aim to generate widespread public opinion about the need for political or even constitutional recognition for these rights, for instance the establishment of labour rights protecting workers. Part of a justification of civil disobedience might be that citizens reasonably believe that new rights should be afforded political and legal recognition.

(2) In order to substantiate the idea that new rights emerge against the backdrop of new problem situations and concerns, and that civil disobedience can play a role in the process, one can look at the gradual emergence in recent times of person-centred environmental rights.⁶

Michael Anderson provides an overview of contemporary legal and moral debates over the relationship between human rights and environmental concerns. The landscape he surveys reveals an increasing tendency for existing rights to be re-interpreted in order that they speak to environmental concerns, for instance over the last ten years the Indian judiciary has actively sought to ground environmental entitlements in re-interpretations of old rights (Boyle and Anderson, 1996: 7). Strong moral, political and legal arguments have also emerged in favour of the creation of new rights in order to specify clearly and forcefully the range of environmental resources and freedoms that citizens are entitled to (Boyle and Anderson, 1996: 8). Such rights include the right to a healthy environment, including the right to protection of the air, soil and water. Over the last decade or so environmental rights of this kind have been incorporated into several national constitutions and international legal statements.⁷ Talk of environmental rights and their realisation in legal norms is a process still in its infancy, so there is as yet very little common ground over the

⁶ The rights under discussion are all predicated on actually existing persons, not future generations, and so avoid Parfit's famous non-identity-problem.

⁷ Tim Hayward provides a fairly comprehensive list of these constitutional revisions (at the time of the book's publication), and provides links for tracing more information on emerging constitutional protection of environmental rights (Hayward, 1998: 178ff).

normative foundations of these rights, or on the practical issues of how these rights can be interpreted in particular contexts.⁸ But the emergence of this legal and moral discourse reflects the dynamic nature of rights expressed above.

Tim Hayward has recently argued that human rights can be mobilised to promote environmental considerations. In particular he argues that Rawls' notion of primary social goods can be employed to defend various environmental liberties and resources (Hayward, 1998: 156-158). The idea of primary social goods relates to goods that every rational person can be presumed to want, because they facilitate the pursuit of a wide range of life-plans (Rawls, 1972: 62). Environmental goods can be seen as social primary goods because they are goods that the basic structure of society can significantly guarantee: for instance through regulating pollution levels and pursuing environmentally friendly economic and industrial policies. Hayward suggests that environmental goods can be classified as either social goods in the mould of Rawlsian basic liberties or social goods in the form of Rawlsian resources like income and wealth. According to Hayward 'in addition to standard personal, civil and political liberties, we might therefore also include a right to protection from some kinds of environmental harm' (Hayward, 1998: 157).

Hayward's ideas demonstrate that lists of basic liberties (or any general account of social goods) are amenable to expansion and development in the light of changing circumstances and concerns. The emergence of heavy industrial

⁸ See the essays in Boyle and Anderson (1996).

techniques, declining natural resources and scientific research on the effects of pollution on human health, have all contributed to a heightened awareness of the dangers of neglecting environmental goods. The recognition that a safe and healthy natural environment can and should be seen as a Rawlsian primary good, something which most rational persons can be presumed to want, may emerge as we experience its absence or erosion. Environmental rights and liberties can be acknowledged as a way of signalling the overriding importance of environmental goods for the pursuit of a rational life plan.

The emergence of theoretical and legal arguments in favour of environmental rights does not merely substantiate the dynamic character of rights. It also illustrates the way in which popular campaigns involving publicity generating acts of civil disobedience contribute to the promotion of new rights paradigms. Some of the most effective campaigning geared towards promoting environmental concerns and the human costs of pollution has been carried out by groups such as Greenpeace, which employ a mixture of traditional lobbying, networking, and non-conventional forms of direct action, such as civil disobedience.

John Dryzek discusses the emergence and role of the Environmental Justice Movement in the U.S. from the late 1970s onwards. The movement, a loose network of concerned neighbourhoods and citizens, formed to articulate concern about the costs of environmental risks accrued as a result of dangerous industrial practices, and about the tendency for those costs to fall disproportionately on

ethnic minorities and the poor (Dryzek, 1997: 177). According to Dryzek the movement 'engages in litigation and lobbying, but it is also more comfortable with confrontational tactics involving demonstrations, blockades, sit-ins, and boycotts' (Dryzek, 1997: 178). Protests of this nature often appeal, albeit in fairly rhetorical fashion, to a re-conceptualised rights discourse in which freedoms from environmental harm and entitlements to environmental resources play a prominent role. In this way, the protesters are using the *currency* of Rawlsian justifications of civil disobedience, namely public political principles and basic liberties, but in a slightly different way to that recommended by Rawls. Instead of protesting violations of clearly defined and constitutionally established principles, the protesters are seeking to reform those principles in the light of new experiences.⁹

(3) The emergence of environmental rights and the role civil disobedience has played in promoting these rights illustrates the implications of amending Rawls' theory of civil disobedience in the way suggested. Civil disobedience as a campaign for new rights can be defended as an attractive normative theory because it demonstrates how principled acts of protest can play a role in extending and developing a society's conception of justice and its system of rights in the light of new problems and concerns. It also offers further clarification of the difference between constitutional testing and civil

⁹ Arguably similar stories could be told about the emergence of rights in relation to labour law and family law. Right of workers and family members were only acknowledged after new experiences and concerns lead to public campaigns – often involving illegal protest – in favour of reform. According to one commentator: 'The right to strike, and to form trade unions, was established through...grass roots organisation and agitation, often in open defiance of the laws of the day.' (Randle, 1994: 179).

disobedience, in that the latter can be seen as a clearly political form of protest geared towards the creation of new law and the former can be seen as a means of upholding established law. I explore both of these claims in turn.

First we can observe that, in contrast to Rawls' theory, the idea that civil disobedience can be part of a campaign for new rights gives this form of protest a slightly different *role* in a constitutional democracy. According to Rawls the role of civil disobedience in a nearly just regime is that it bolsters the security and justice of such a regime. He says that 'by resisting injustice within the limits of fidelity to law, it serves to inhibit departures from justice and to correct them when they occur' (Rawls, 1972: 383).

The role of civil disobedience as a campaign for new rights is slightly different. As we have seen, this kind of civil disobedience is not so much geared towards protesting departures from already established principles of justice, but at reforming and extending an already existing system of rights. In this sense, civil disobedience contributes to the development of a society's conception of justice, so that it speaks to new problems and concerns. The primary virtue of this kind of civil disobedience is its dynamic role in re-articulating a society's conception of justice, not its defensive role in protecting a society's conception of justice. Cohen and Arato claim that insofar as civil disobedience plays a role in creating rights, 'it initiates a learning process that contributes to the development of political culture and to institutional change' (Cohen and Arato, 1992: 582). Civil disobedience becomes a mechanism for ensuring that a conception of justice or

set of rights does not become *static* by being unresponsive to new problems. By making this move, we can partly respond to Singer's criticism that Rawls' method of justifying civil disobedience implies that a society's conception of justice becomes a standard 'valid for all time' (see above, p.62). Civil disobedience as part of a campaign for new rights coheres with intuitions about the dynamic nature of rights, and the tendency for perceptions to change in the light of new experiences and ideas.

One of the problems of situating civil disobedience within an ongoing process of developing and extending a society's system of rights is that the justificatory strategy employed by Rawls, and endorsed in chapter 1, must be slightly altered. In Rawls theory, civil disobedience is justified because government law and policies are failing to respect the principles that regulate social co-operation. In appealing to public political principles, protesters provide a political justification of their act. They say to other citizens that, in their considered judgment, one of the reasons for compliance with the law – that it is in harmony with public principles of justice – does not apply, or applies with less force than it otherwise does. Citizens engaged in civil disobedience as a campaign for new rights cannot have access to quite the same argument. Citizens are not appealing to clearly defined basic liberties that, as part of the fair terms of social co-operation, should be guaranteed for all citizens. Instead, they are trying to extend the range of basic liberties, and therefore reform the fair terms of social co-operation. What, then, would a political justification of this kind of civil disobedience look like?

In response to this apparent problem it should be noted that though a slightly different justification might be necessary, no *radical* change is required. Although civilly disobedient citizens cannot appeal to clearly defined basic liberties that should in principle be recognised by all citizens, they can still employ a broadly similar currency of justification. They still appeal to the *idea* of basic rights or basic liberties. They can claim that, in the light of new problems and concerns, new rights should be acknowledged by the democratic community. What protesters need to do is demonstrate that their concerns give them a strong enough basis to disobey the law as part of a campaign for political reform.

I suggest that civilly disobedient citizens who engage in this kind of dissent can point to the *difficulty* of changing and reforming existing systems of rights. In fact, it can be suggested that groups seeking to reform the law so that it acknowledges the need for new basic rights have a harder task than groups seeking to repeal laws that violate already established rights. In the latter case, judicial procedures geared towards detecting clear and substantial violations of constitutionally guaranteed rights are already in place. Part of the aim of civil disobedience against rights-violations is to persuade judicial institutions to enter into a dialogue over the constitutional status of a contested law. Moreover, it may also prove easier to mobilise public opinion against the rights-violating law or policy. This is particularly so given Rawls' belief that the kind of injustices which might suffice to justify civil disobedience should be 'clear' and 'obvious to all' (Rawls, 1972: 372). Citizens engaged in protest against clear violations of

the equal liberty principle are seeking to alert the democratic community to injustices that are clear enough and serious enough to be beyond dispute. Assuming that the majority of citizens possess a sense of justice, then the protest should find a sympathetic audience.

Protesters seeking to introduce new rights face higher hurdles. Firstly, no constitutional provisions or established rights are available to appeal to, meaning that judicial checks on political power cannot be easily activated. This means that there is little hope of harnessing legal or judicial mechanisms in the course of campaigning for new rights.¹⁰

Secondly, in order to secure the political climate necessary to facilitate law and legislation geared towards reform, it may be necessary to employ dramatic attention grabbing tactics to disturb old orthodoxies and allow new ideas to gain a purchase on public deliberation. If we take the example of environmental rights, then we can see how establishing a political and legal climate hospitable to reform has been, and continues to be, a daunting one. Establishing a commitment to environmental rights – for instance clean air and water – might entail politically tough decisions – for instance unpopular regulation of industry that might allegedly hurt productivity or global competitiveness. Establishing such a commitment requires a challenge to existing orthodoxies about policy priorities. It requires contesting the idea that industrial policy is orientated solely

¹⁰ As exception to this might be an appeal to international law, if the rights that protesters are campaigning for have been accorded legal recognition in binding international treaties or conventions.

towards maximising levels of productivity or profit, and embedding the notion that other concerns might supersede these aims. In order to contest the power of existing assumptions, potentially dramatic forms of public protest might be helpful. Such protest is aimed at creating a space for public deliberation and discussion over the merits and strength of the case for change.¹¹ Civil disobedience can be justified as an especially effective means of publicising the case for new rights, mobilising public opinion in favour of the change, and pressurising political actors.¹²

Second, as we saw above in Rawls' theory, the boundary between justified civil disobedience and the constitutional testing of the laws appeared unstable, because both are characterised by a sincere and reasonable conviction on the part of citizens that laws or policies clearly and substantially violate basic liberties accorded constitutional protection. Incorporating civil disobedience as a campaign for new basic rights allows us to mark a clearer distinction between justified civil disobedience and constitutional testing. If citizens can publicly justify civil disobedience as an attempt to encourage legal and political actors to recognise *new* rights, then their activity is more clearly differentiated from constitutional testing.

¹¹ The idea of using civil disobedience to disturb prevailing orthodoxies will be developed later in this essay, when the principles of a deliberative democracy are used as a resource for augmenting rights-based defences of civil disobedience (see below, chapter 4).

¹² Of course, more effective channels than civil disobedience might be available to build momentum for a change in law. It seems reasonable to support Rawls' suggestion that citizens should, if possible, seek to employ institutional means of change before engaging in illegal protest action.

Constitutional testing (and Rawlsian civil disobedience) presupposes that laws and policies violate rights that are already publicly acknowledged and afforded legal protection. When citizens directly disobey these laws, they enter into a legal dialogue with the judicial system about the constitutional status of these laws, with the consequence that the legal status of their action is harder to ascertain. As we saw in the last chapter, a protester in this situation might reasonably deny that his action should be viewed as illegal, and claim that he is in fact following the letter of the law more closely than the state.

Civil disobedience as a campaign for new rights, however, does not raise these kinds of issues. Protesters campaigning for new rights know that they cannot appeal to an already established system of rights, or already established constitutional provisions, because the rights they want to see acknowledged are not recognised by them. It will not be possible or relevant for citizens to engage in a legal dialogue with the judicial system about the interpretation and application of established rights law. Rather, they must campaign for these systems of rights and, perhaps, these constitutions to be *reformed* in order that they incorporate the new rights. In this sense, civil disobedience as rights creation is a more thoroughly *political* form of protest, as it is directed first and foremost to the democratic community to pass new law through legislation. Constitutional testing is more like an attempt to persuade the judicial system to perform its function of restraining the decisions of the democratic community according to constitutional norms.

It is not suggested here that re-defining justified civil disobedience in this way removes altogether the blurred boundary between it and constitutional testing. The theory developed here still allows for the possibility that citizens can engage in 'illegal' activity if they believe that laws and policies violate already established rights. In these cases it might prove simply impossible to fully distinguish between justified civil disobedience and constitutional testing – as controversy in America over the legal status of some acts carried out by the civil rights and anti-war movement suggests.¹³ It is likely that in these situations protesters will try to make reasonable constitutional arguments in defence of their actions, and hope to persuade the democratic majority that the disputed laws and policies are in fact invalid. These hard cases are less of a problem if we can account for the illegality of *some* acts of justified civil disobedience, those that are either indirect or geared towards the creation of new rights. It might reasonably be said that *most* acts of justified civil disobedience could be viewed as clearly illegal, given the commonality of indirect civil disobedience (Cohen and Arato, 1992: 580). The general, but not universal, status of justified civil disobedience as a clearly illegal act aimed at the reform of existing law can be preserved even if a few hard cases remain.

In summary: I have suggested in this section that civil disobedience can be a justified means of attempting to extend established systems of rights in the light of new problems and concerns. This offers an attractive normative account of

¹³ A theme of Dworkin's early articles on civil disobedience was that acts carried out by the civil rights and student movement were not, properly speaking, illegal (see Dworkin, 1978). Arguments exonerating the civil rights movement from committing genuinely illegal acts are explored in Black (1965) and Marshall (1965).

justified civil disobedience, stressing the pro-active role it plays in ensuring that existing rights-discourses speak to new problems, and offers a firmer distinction between civil disobedience and constitutional testing, emphasising the political and reformist dimension of the former in contrast to the legal and corrective dimension of the latter.

II. Civil disobedience and reasonable belief

In the rest of this chapter my account of civil disobedience will be expanded, and defended against some powerful objections. This section elaborates a hitherto underdeveloped feature of the rights-based justification of civil disobedience discussed here. The feature is that civil disobedience should be seen as justifiable in a constitutional democracy if civilly disobedient citizens have a certain *belief* about law and policy. Against the objection that this makes civil disobedience too easy to justify, I suggest that civilly disobedient citizens must hold beliefs that are sufficiently *reasonable*.

Why should civil disobedience be viewed as justified merely because a protester has a certain belief about a law or policy? The case in favour of this position has been elaborated forcefully by Ronald Dworkin. According to Dworkin, a working theory of civil disobedience should avoid what he calls a 'tempting shortcut'. The shortcut is to make the justification of civil disobedience depend on the actual wickedness of the law or policy that it opposes. The problem with this shortcut is that 'almost everyone will agree that *if* a particular decision is

very wicked, people should disobey it...but this agreement will be worthless in particular, concrete cases, because people will then disagree whether the law *is* that wicked, or wicked at all' (Dworkin, 1985: 106). According to Dworkin, 'we must try to develop a theory of civil disobedience that can command agreement about what people should actually do, even in the face of substantive disagreement about the wisdom or justice of the law being disobeyed' (Dworkin, 1985: 106). A theory of civil disobedience should explore kinds of beliefs that, if sincerely held by conscientious citizens, would justify setting aside the normal reasons for legal behaviour. The question such a theory addresses is: 'what is the right thing for people to do given their convictions, that is, the right thing for people who believe that a political decision is wrong or immoral in a certain way' (Dworkin, 1985: 106).

Following Dworkin, I suggest that civil disobedience is justifiable when citizens believe either that law or policy violates basic rights, or that law and policy should recognise and grant new rights to citizens. According to this conception, the democratic community should accept an act of civil disobedience as justified if civilly disobedient citizens have either of these two beliefs.¹⁴ This might be compatible with thinking that the protesters are actually *wrong* in their beliefs. As Dworkin recommends, the theory invites members of the democratic community to ask themselves, "what would be the right thing for us to do if we had [the protesters'] beliefs?" (Dworkin, 1985: 106) In a democratic society, where the binding power of law at least partly depends on the extent to which it

¹⁴ In the next two chapters I extend this account of justified civil disobedience so that it also incorporates beliefs about the deliberative pedigree of democratic processes.

guarantees rights, citizens who sincerely believe that law or policy fails to do this are at least potentially justified in engaging in civil disobedience (Dworkin, 1985: 110-111). Even if other members of the democratic community disagree with the substance of the protesters' arguments, they can accept that, because the protesters held the beliefs they did, they did not act as bad citizens in engaging in civil disobedience.¹⁵

A powerful objection to a belief-based account of justification is that it appears to make civil disobedience too easy to justify, as it counter-intuitively allows *any* belief about rights, no matter how outlandish, to justify civil disobedience. Eugene Schlossberger illustrates the potential problems that emerge when the protester's state of mind is the relevant standard of justification for civil disobedience. He says, "if we adopt an internalist view of evaluation, our evaluations become hostage to every bizarre view of dissenters" (Schlossberger, 1989: 151). Civil disobedience is justified provided that protesters sincerely believe that a law or policy violates basic rights, or sincerely believe that the democratic community should acknowledge new rights. This might allow persons with crazy beliefs about rights to engage in campaigns of civil disobedience. A civilly disobedient citizen might claim that a law or policy violates rights without having any discernible knowledge about what a right is or what it entails.

¹⁵ John Rawls does not actually specify whether or not civil disobedience is justified by virtue of the actual injustice of a law or policy, or by virtue of the considered and sincere belief of the protester that it is unjust. That the latter is a natural interpretation of his theory is suggested when he claims that civilly disobedient citizens must 'decide for themselves' after 'due consideration', whether illegal protest is justified. Provided they do so, civilly disobedient citizens are said to act 'conscientiously' (Rawls, 1972: 389).

Is it the case that a belief based theory would make civil disobedience too easy to justify? In the rest of this section I suggest that a working theory of civil disobedience can retain its focus on the beliefs of protesters, without making civil disobedience too easy to justify. This can be achieved by developing a standard of *reasonable belief* for justified civil disobedience. On the one hand, by insisting that civilly disobedient citizens refer to reasonable beliefs about rights, the theory should avoid the counter-intuitive feature of belief-based theories that Schlossberger criticises. A standard of reasonableness should preclude the possibility, at least for the most part, that citizens with crazy or ill thought out beliefs might successfully justify civil disobedience. On the other hand, the idea of reasonable belief avoids taking the 'tempting shortcut' criticised by Dworkin. The justification of civil disobedience does not flow from the wickedness or injustice of the law, but from the reasonableness of the protesters' beliefs about the law. Whilst it may be difficult for protesters to persuade the wider democratic community of the rightness or correctness of their beliefs about the law, it should be less difficult for them to demonstrate the reasonableness of their beliefs.

The idea of reasonableness developed here has three components. (1) Protesters must accept basic tenants of argument like logic, evidence and (for the most part) common sense. (2) Protesters who believe that a certain law or policy violates rights should be capable of consolidating that belief with second-order beliefs about the nature of rights. (3) Protesters should be flexible in their beliefs, and

be receptive to criticism of their views. I discuss each of these components in turn.

(1) The first component of reasonableness is somewhat informal, in that it does not stipulate hard and fast principles of reason but highlights basic and widely held notions about what it means to argue in a reasonable manner. Most persons recognise that arguments should attempt to avoid blatantly *illogical* moves, for instance arguing from stated premises to conclusions that obviously do not follow. If our arguments are susceptible to this kind of criticism, we are likely to appear unreasonable if we persist in holding onto them come what may. Most persons would accept that arguments should be backed up through appeal to *evidence* (like factual states-of-affairs) that would tend to support our convictions and beliefs. If we hold beliefs about moral or political issues that take no account of circumstances or states-of-affairs that relate to the appropriateness of our beliefs, then we are likely to appear unreasonable to others. Also, we should recognise that if our arguments blatantly offend against ideas or principles that are generally accepted as common sense in our community, then we owe others an explanation of why we set aside these ideas or principles. If we challenge common sense notions through sensible and principled arguments, then we can legitimately claim to be arguing reasonably, but if we simply ignore these notions without any explanation, then unreasonableness will be suspected. All these ideas constitute informal and widely held notions about what it is to be reasonable and to hold reasonable beliefs. There is no reason why justifications

for rights-based civil disobedience should not reflect these notions of reasonableness.

(2) The second component of reasonableness is a little more complex. It stipulates that when protesters reasonably believe that a law or policy violates their rights or that new rights should be acknowledged by the democratic community, they should be capable of backing up their belief through referring to second-order beliefs *about* rights. These second-order beliefs should include a general conception of what it means to have a right: in other words a conception of what a right *is*. Second-order beliefs should also include knowledge of how our claims about particular rights cohere with our claims about other rights: in other words a conception of how individual rights hang together as part of a *system* of rights.

This sounds like quite a daunting requirement, but in fact it is not too demanding on protesters. If someone believes that a law or policy violates their rights, then they will typically have some general notion of what it means to have a right and some general notion of how this particular belief about a right coheres with other beliefs about rights that they have. It is the same when someone believes that the democratic community should acknowledge new rights. If a person believes that new rights should be introduced to protect workers from bad employers, or to guarantee environmental liberties or resources, then he or she should be able to describe their understanding of what a right is. In particular, they should be able to explain why the protections or resources they advocate should be guaranteed

as a right, and how this corresponds with other protections or resources they believe are or should be guaranteed as a right.¹⁶

It is important to insist that those who engage in rights-based civil disobedience fulfil this notion of reasonableness. Citizens who believe strongly enough to break the law, and who seek to convince the wider public that their actions are justified, should be in a position where they can convince others that they at least have a sound and coherent set of beliefs. If civilly disobedient citizens cannot do this, other citizens may doubt either the sincerity or the cogency of their beliefs. When protesters substantiate their opinions with second-order beliefs about rights, they indicate that they have a considered and developed set of beliefs. If a theory of civil disobedience insists that protesters should be so able to substantiate their beliefs, it reduces the likelihood that citizens will engage in civil disobedience with crazy or ill thought out beliefs. The theory hopes that if protesters have a well thought out set of beliefs, they will be in a better position to make sound judgements about the justice or injustice of particular laws.

Before moving on I want to briefly say something about the plausibility of this component of the reasonable. Despite the suggestion that this component of reasonable belief is well within the capabilities of ordinary citizens, some might complain that this is all far too 'cognitive' or 'philosophical', and utterly removed from the realities of political protest. It portrays protesters as being

¹⁶ This might involve an account of how rights derive from Rawlsian primary social goods, which all rational persons are presumed to want, or how rights are predicated on fundamental human interests, or how rights protect people from domination or coercion.

more like political philosophers, with highfalutin' conceptions of rights or justice, than ordinary citizens with real grievances against the state.

In response, two points can be made. One is to affirm the idea that if persons are to be informed and active citizens in a constitutional democracy, then it is not unreasonable to expect them to make certain efforts in presenting their arguments and convictions in the most persuasive, reasoned and consistent manner possible. Another more important response is to point out that, in actually existing democracies, campaigns of civil disobedience generally do not represent spontaneous or idiosyncratic actions by uninformed citizens. Following Hannah Arendt, it can be said that civil disobedience typically represents action taken by groups of concerned citizens who associate and rally around a common cause of concern (Arendt, 1969: 95-99). Campaigns never simply happen, but emerge after a period of intensive organisation and internal debate within groups contemplating direct action. Such debate involves discussion and planning about what tactics to employ and when, how best to maximise favourable coverage and publicity and, crucially here, how best to convey the message of the protest and the beliefs behind the protest. This internal debate within groups provides a kind of schooling for citizens who engage in civil disobedience, and enables considered convictions and beliefs to be developed and honed through dialogue with others.

Examples of this organisation and discussion can be found in the earliest acts of the civil rights movement. It is well known that Rosa Parks' symbolic refusal to

acquiesce in demands to give up her bus seat in 1955 provided a catalyst for the civil disobedience campaign carried out over the next decade. It is less well known that several months before her 'spontaneous' act she had attended workshops on race relations, political education and direct action organised by and for persons later associated with the civil rights movement (King, 1996: 42-43; Cook, 1998: 100-101). This dimension of pre-planning and internal discussion is also a hallmark of civil disobedience carried out recently by a range of groups over national and international social and economic policy.¹⁷ These examples suggest that it is not unreasonable to expect protesters to have well-developed and reasonable beliefs. Extensive group-orientated discussion and pre-planning normally ensures that protesters do have the opportunity to develop and refine principled arguments in favour of their position.¹⁸

(3) The final component of the reasonable has less to do with the quality or pedigree of the beliefs behind a particular protest, and more to do with a reflective and flexible disposition on the part of protesters.¹⁹ Civilly disobedient citizens should be orientated towards rationally *persuading* others that their act of civil disobedience is principled and justified. The willingness to engage in this kind of strategy indicates that protesters are not unreasonably cajoling the

¹⁷ For an example see Esther Kaplan's discussion of the extensive organisation, pre-planning and internal debate that preceded civil disobedience actions against aspects of U.S. social policy in New York on April 25, 1995 (Kaplan, 2002: 41-51). See also the appropriately titled *Civil Disobedience Handbook*, which offers advice to those embarking on direct action. Amongst other things, the handbook recommends extensive organisation and formulation of clear statements about the moral/political case for breaking the law (Tracey, 2002: 69, 72).

¹⁸ An analogy might be made here with Philip Pettit's defence of social movements as 'clearing houses' where citizens' complaints and concerns can be discussed and assessed before being introduced to a wider public (Pettit, 1997: 193).

¹⁹ The brief account described here is highly influenced by Iris Marion Young's notion of reasonableness in Young (2000): 24-25.

majority into accepting some view about rights that they may have no good reason to accept. Instead, they are seeking to appeal to the sense of justice or reason of the majority (Rawls, 1972: 364; Cohen & Arato: 1992: 587-588).

Civily disobedient citizens should also be receptive to counter arguments and criticism from others. Engaging in civil disobedience involves entering into the public arena of a democratic community, attempting to highlight concerns and issues and attempting to persuade the majority to revise its opinion on a certain matter. This process is not, however, strictly one way. Protesters will or should anticipate having to defend their beliefs and actions against the objections of others. This involves exhibiting what Iris Young calls 'deliberative uptake', responding to concerns and questions raised by others. It also involves acknowledging that 'To be reasonable is to be willing to change our opinions or preferences because others persuade us that our initial opinions or preferences...are incorrect or inappropriate' (Young, 2000: 25). By seeking to persuade others and being receptive to their counter-arguments, citizens engaging in civil disobedience indicate the reasonableness of their actions to others.²⁰

To summarise: in this section I elaborated and defended the idea that civil disobedience is justified when citizens have a certain belief about law or policy. I responded to the concern that this would make civil disobedience too easy to justify, by elaborating a conception of reasonableness. This conception indicates

²⁰ It must also be stressed that the audience to which the civil disobedience is addressed should exhibit deliberative uptake as well.

the kinds of constraints that can be placed on the pedigree of rights-based beliefs that figure in justifications of civil disobedience.

III. Civil disobedience and the stability of a constitutional democracy

In this section I respond to another objection to the account of civil disobedience developed here. The objection is that even supposing reasonable constraints are placed on the kinds of beliefs sufficient to justify civil disobedience, there may be a large enough scope for justified civil disobedience to threaten the stability of a constitutional regime. Excessive moral leeway to engage in civil disobedience might lead to an outburst of de-stabilising and socially divisive protests, or might undermine the binding power of law by challenging widespread certainty that judicial or political decisions will be abided by throughout the society. In this section I respond to this concern by interrogating the notion of stability itself and pointing out built-in limitations to justified civil disobedience as understood in this essay.

Initially I want to spell out the stability objection. Critics might claim that even if we insist that citizens are reasonable in forming their beliefs about rights, there may be many instances where citizens believe they are morally justified in disobeying the law. In particular, existing states are notoriously prone to imperfections in the realization of complex normative ideals like rights or democracy. This means that there are often instances where laws, policies or other institutional or political actions will be or will appear to be unjust or subject

to moral criticism. Nevertheless, it seems wrong to endorse a position that would sanction widespread dissent in the face of these inevitable imperfections, as this might undermine the stability and even the survival of democratic and judicial institutions (Milne, 1990: 22-23; Zashin, 1972: 126-127). Just because actually existing institutions or constitutional arrangements are imperfect does not mean that they should be continually challenged and threatened by potentially destabilising public protest.

The rights-based account of civil disobedience under discussion does afford citizens a large degree of leeway in their deliberations over whether or not to disobey the law. However, two answers can be given to the charge that this leeway risks undermining the stability of a constitutional democracy. (1) Under normal conditions a morally permissive theory of civil disobedience should not lead to serious instability because this form of protest is self-limiting. (2) Under extraordinary circumstances a morally permissive theory of civil disobedience might lead to serious instability, but if those circumstances obtain it is an open question whether preserving stability should be seen as the primary concern of a democratic community.

(1) First, I look at the issue of whether or not the amount of civil disobedience morally permitted by a rights-based theory really would, at least in ordinary circumstances, lead to excessive instability in a constitutional regime. Ordinary circumstances are here understood as: an established democratic community with a range of fully functioning political and legal institutions, general compliance

with laws generated and enforced by those institutions, and a general belief in the justice and democratic legitimacy of those institutions.

It is not contested that civil disobedience might cause some disruption within such a state, or that civil disobedience might alter attitudes about the binding power of law (by encouraging citizens to see the law as subject to moral criticism and not blind obedience). However, what is contested is the idea that civil disobedience will cause so much instability that the normal functioning of democratic and judicial institutions becomes impossible and the everyday lives of citizens become subject to excessive uncertainty. In fact, justified civil disobedience has built in mechanisms which tend to dilute fears that either a general disposition to engage in it or a public political culture that tends to regard it as morally justifiable will result in great instability.

The first characteristic of justified civil disobedience relevant to assessing its impact on the stability of a constitutional regime is the conduct or manner of the protesters. It seems reasonable to suppose that violent acts of civil disobedience might undermine the stability of a constitutional regime. In order to back this claim up, one could refer to the uncertainty and instability caused by terrorist acts within constitutional regimes. Terrorism, from the chaos caused by individual acts to the general sense of unease brought about through knowledge that a community is or may be the target of an act at any time, is orientated towards causing as much instability as possible. Insofar as a civilly disobedient citizen or group shares the terrorist's willingness to embrace violent means as a tactic, then

their actions might cause similar unease, uncertainty and instability throughout society. If justified civil disobedience shared some of the violent features of terrorism then it might have similar de-stabilising consequences.

However, whilst the *definition* of civil disobedience that I employ allows for the conceptual possibility of violent civil disobedience, as I stated in the introduction, this does not mean that civil disobedience can be *justifiably* violent. In fact, as I shall argue in chapter 5, a crucial component of justified civil disobedience is that it avoids, as far as possible, injury or hurt to others. This can be defended through reference to general moral arguments, and also through reference to the public political principles which inform political justifications of civil disobedience. I do not want to anticipate too much of this discussion here. It is relevant to emphasise, though, that the ideal of non-violence has deeply informed the practice of civil disobedience within constitutional democracies. Influential practitioners like Gandhi and Martin Luther King tended to demand as a moral requirement that protest movements embed values of respect for others and non-violence in their conduct.

Non-violent civil disobedience in ordinary circumstances will generally avoid creating excessive instability. Generally speaking, civilly disobedient groups and citizens will publicise their protests well in advance, to maximise the potential for media coverage, and also will go out of their way to profess and display commitment to non-violence, to try and ensure that media coverage is favourable. This publicity and commitment to non-violence should prepare the

wider democratic community for the protest, and allay any fears that they may be physically harmed as a result of the protest. The contrast with terrorism or violent civil disobedience is helpful here. Terrorist acts tend to lack the characteristics of advance publicity or non-violence. The potential for terrorism to cause instability derives from the shock caused by sudden attacks, and the pervasive unease inspired by the fear of being the victim of a violent or destructive attack. Provided that civil disobedience is non-violent and public, it should not cause such instability.

The second characteristic of justified civil disobedience relevant to assessing its impact on the stability of constitutional regimes is the attitude of the civilly disobedient citizens towards the institutions of a constitutional regime. Civilly disobedient citizens engage in public and illegal protest in order to oppose government law and policy, and to mobilise public opinion against the disputed law and policy. The protest action forms part of a broader political campaign to promote political reform. Whilst civilly disobedient citizens may not hold existing political institutions and political actors in high moral regard, they still see such institutions and actors as potential means to bring about the political reform that they desire. This gives civilly disobedient citizens at least a pragmatic reason not to de-stabilise these institutions, or indeed the life of the wider democratic community, too much. The optimal strategy for protesters is to build up political momentum and generate widespread support for political change. It makes little sense to demand a change in law and policy if one's attempts to bring about such a change are so de-stabilizing that one undermines

the survival of the institutions necessary to make and enforce that change. This does not mean that civil disobedience cannot be at all disruptive or too disorderly to ignore, but it does mean that it should not be so aggressive or tumultuous that it radically de-stabilises the polity.

Finally, another self-limiting aspect of civil disobedience, at least according to the account developed here, is that whilst civil disobedience may be a politically justified act, it is not necessarily one that the state cannot legitimately arrest and prosecute citizens for. The illegality involved in civil disobedience, will tend to automatically trigger the 'defence' mechanisms of the state, as it seeks to arrest and incarcerate those who violate its laws, the medium of its coordination of stable social interaction. The state can do this in the name of enforcing general stability and compliance with its laws. Moreover, those engaging in civil disobedience often do so with the precise intention of incurring such a response from the state, in order to both generate publicity and demonstrate the moral integrity and conviction behind the protest (showing that one cares so much about an injustice that one is prepared to suffer the possible consequences of protesting it).²¹

This protects the stability of constitutional regimes in at least two ways. On the one hand it allows states to prevent any protest from getting out of hand to the point where it constitutes a real threat to either stability or general safety.

²¹ See the definition of civil disobedience in James Tracey's *The Civil Disobedience Handbook*: 'Generally speaking, CD is a tactic where the participants anticipate and often plan on getting arrested for the cause' (Tracey, 2002: 68). See also McWilliams (1969) 226.

Arresting those involved in the protest can neutralise any such threat. On the other hand it acts as a general disincentive for groups contemplating civil disobedience as a means of protesting an injustice. It will not (and should not) deter all groups from carrying out such protest, particularly if the perceived injustice is especially serious and detrimental to the lives or opportunities of a large group of persons. However, it is likely to deter some groups, such as those whose concerns are not so serious that they will want to risk imprisonment.²²

Before moving on, I want to say a little more about the question of how the state should respond to civil disobedience. Despite the fact that imprisonment and punishment may be defensible reactions to illegal protest, there *is* a distinction between those who break the law for moral or political motives and those who break the law for purely self-interested or recognizably criminal motives (Arendt, 1969: 73-76; Habermas, 1985: 111-112; Rawls, 1972: 366-367). Those who want the state to show some leniency in its treatment of political protesters often struggle to show how states can reconcile the understandable need to uphold the rule of law by arresting and prosecuting protesters and the imperative of acknowledging the moral difference between the civilly disobedient citizen and the private criminal. Legally, this difficulty is compounded by the insignificance of *motive* in much of the relevant judicial discourse; for instance criminal

²² These arguments are anticipated by Randle: 'we are talking here not of making civil disobedience *lawful* – that is a contradiction in terms – but rather of fostering a culture in which it has a recognised place but where its validity in any given instance is a matter for public debate and judgment. One safeguard against civil disobedience leading to any kind of military coup is precisely that the groups involved in civil disobedience have to face the penalties the law prescribes' (Randle, 1994: 192).

prosecutions in the UK only have to ascertain *intent* to violate law in order to secure a conviction (Norrie, 1993: 36-37).

Political theorists like John Rawls, Jürgen Habermas and Ronald Dworkin respond to this by appealing to the discretion that courts have in setting sentences for those convicted of political crimes and the discretion of state prosecutors not to go ahead with criminal actions at all. According to Rawls, 'courts should take into account the civilly disobedient nature of the protester's act, and the fact that it is justifiable (or may seem so) by the political principles underlying the constitution, and on these grounds reduce and in some cases suspend the legal sanction' (Rawls, 1972: 387). Pointing to prosecutorial discretion and lenient sentencing is an appealing response to the problem, as it acknowledges the state's entitlement to punish those who break the law and denotes a means for the state to acknowledge the special moral status of civil disobedience compared to ordinary crimes. The problem of how to inculcate a disposition *against* throwing the book at protesters, however, remains.²³

So the idea that allowing a significant degree of moral leeway for citizens contemplating civil disobedience will inevitably lead to radical instability within

²³ The propensity for legal actors in constitutional democracies to seek excessive punishments for those engaging in civil disobedience was illustrated in a recent case in the U.S. In July 2001 Several Greenpeace activists were arrested for intentionally entering a Vandenberg Air Force Base to protest against the U.S.'s proposed anti-missile defence shield. Instead of automatically being charged with expected misdemeanour trespass, protesters were for several months threatened with the possibility of a felony charge with a potential six-year prison sentence and \$250,000 fine. In the event the charges were dropped, but that they were seriously considered for so long by the U.S. Attorney's office indicates the difficulty of inculcating a political or legal culture friendly to civil disobedience, even in a nation with such a rich history of it. See Greenpeace press release at <http://www.stopstarwars.org/html/sw17.htm>.

constitutional democracies can be disputed by pointing to the self-limitations of this form of political protest. The working theory can insist that civil disobedience be non-violent, suggest that citizens recognise the value of preserving stability, and allow that the state may arrest and prosecute those who engage in justified civil disobedience. All these characteristics should tend to guard against the threat of instability in ordinary circumstances.

(2) The second answer to the objection is slightly different. It concedes that in some extraordinary circumstances civil disobedience in a constitutional democracy might lead to a significant amount of instability. Those circumstances are: when concerns about rights violation or the need to introduce new rights become so widespread, and so many persons engage in civil disobedience, that political institutions are no longer capable of fulfilling their socially integrative function. It is difficult to envisage what this situation would look like in an established constitutional democracy; serious upheavals in established constitutional democracies have often been instigated through parliamentary or judicial means, not direct action.²⁴ Perhaps civil disobedience would escalate to the point where the defence mechanisms of the state are ineffective. For instance, regular police forces might be incapable of arresting the masses of persons engaged in civil disobedience, or the judicial system might become frozen by the sheer numbers of protesters it has to prosecute. Whatever the details, let us suppose that civil disobedience could result in serious instability within a constitutional democracy. The question is whether or not this

²⁴ For instance, the 1933 election of a national socialist government in the Weimer republic; or the Supreme Court led New Deal policies of America in the 1930s.

possibility should give us reason to revise the theory, to make civil disobedience harder to justify and hopefully less prevalent.

The possibility of serious instability in these circumstances should not lead to a more restrictive account of civil disobedience. The reason is: If so many people really do reasonably believe that significant areas of law or policy are so seriously unjust that they embark on personally dangerous and risky acts of dissent against the state, then this may constitute convincing evidence that the state in question really is deeply unjust and, in the eyes of its citizens, lacking in legitimacy.

The extraordinary circumstances that lead to instability induced by civil disobedience must raise serious concerns about the justice and legitimacy of political institutions, not to mention their capacity to ensure the degree of respect from its citizens necessary for it to perform its socially integrative function. When constitutional democracies reach such a crisis point in terms of their legitimacy in the eyes of citizens, it is not necessarily obvious that stability should always be preferred to seriously de-stabilizing activity that might lead to the removal of the injustice. In fact, from a moral point of view, unless the potential consequences of the instability obviously outweighed the potential gains in justice, it may be more likely that we should support the action carried out to remove the injustice. To say otherwise is to give stability an automatic priority over justice, which at the very least is not a *de facto* position but one that

requires moral argument, probably in the light of the particular and extraordinary cases where a choice between the two needs to be made.

Given the fact that civil disobedience usually does not lead to instability because of internal self-limitations, and given that extra-ordinary conditions would need to obtain in order for civil disobedience to ever radically challenge stability, belief-based theories like the one pursued here can legitimately bite the bullet and say that stability should not always trump action geared towards remedying what we assume must be serious injustice. If so many people reasonably believe state law or policy to be unjust, and are prepared to back that up through civil disobedience, then they may be morally justified in doing so *even if* it radically challenges the stability of the regime.

To summarize: in this section I argued that the rights based theory of civil disobedience pursued here is not seriously compromised by the criticism that it may lead to the de-stabilizing of constitutional regimes, even if the theory would permit a great deal of disobedience. In ordinary circumstances, civil disobedience has characteristics that tend to undermine its capacity to be seriously de-stabilising. In extraordinary circumstances where civil disobedience might threaten stability, the nature of those circumstances means that stability is not necessarily preferable to action geared towards enhancing the justice of the constitutional democracy.

IV. Civil disobedience and free riding by the insincere protester

In this section another potential problem with the working theory of civil disobedience is discussed. The problem is that by making the justification of civil disobedience depend upon protesters having a reasonable belief about rights, the theory might encourage free riding by protesters with *insincere* beliefs about rights. Is there any way that the theory can reduce anxiety about this issue without shifting the focus from reasonable belief? In response to this concern, a rights based theory can point to the disincentive effect that the threat of legal sanctions might have on insincere protesters, and the role of the wider democratic community in de-bunking insincere beliefs about rights.

The problem relates to potential implications of the theory if its prescriptions became widely acknowledged throughout society. Imagine that a culture emerged that was friendly to the idea of civil disobedience, manifested in a disposition on the part of citizens to engage in it to defend and promote rights, a sympathetic response from the wider political community, and flexibility on the part of legal agents of the state. In these circumstances, civil disobedience might be seen as an effective means for various groups to publicize their concerns and instigate wider debate and action in the relevant society.

This is not especially problematic from a theoretical perspective, and would arguably be a more desirable state of affairs to the one more familiar from experience: where constitutional democracies (to say nothing of unconstitutional

democracies) are often unwilling to listen to or acknowledge the principled dissent of its citizens. However, one undesirable consequence might be to encourage groups protesting about law or policy to couch their complaints in terms of rights or justice when in fact they do not really or sincerely believe that their complaint can or should be couched in these terms. It might be possible to engage in civil disobedience under the cover of a reasonable belief about rights, when in fact groups know full well that their complaint is not best expressed in those terms. This might be the case even if exacting standards of reasonableness are expected, for instance protesters might be intelligent or manipulative enough to develop a fairly well developed account of rights to back their 'belief' up. By virtue of hiding their real motives for breaking the law, groups might expect a more sympathetic response from the wider political community than they otherwise would have received.

It is unlikely that the danger of bad faith can ever be fully dispelled. Theorists working in deliberative democratic theory confront analogous problems, where theories of public reasoning are vulnerable to manipulation by clever or powerful interest groups (Elster, 1998a: 100-105; Elster, 1986: 112-120). However, it is possible to suggest resources that a belief-based theory of civil disobedience might possess to reduce the threat of its normative prescriptions being hijacked by insincere protesters.

Firstly, it should be remembered that the illegality of civil disobedience does make it a risky strategy for protesters to pursue. Even if there were a more

receptive climate for this form of disobedience, it will still be the case that those engaging in it can expect to be arrested and possibly tried by the courts. This means that civil disobedience is not a low-cost exercise. Citizens will generally deliberate long and hard about whether or not to engage in this form of activity, or whether the potential benefits in terms of increased publicity and pressure on government outweigh the detriment of possible punishment. It is reasonable to suggest that protesters with a genuine moral commitment to the cause they are fighting for will be more likely to suffer possible consequences than protesters who engage in moral discourse with a hidden agenda or ulterior motives. Of course this might not always be the case, and it is possible that protesters who feel they have a lot to gain in terms of influence and publicity will risk the consequences of their actions. Despite this, just as the threat of sanctions is a disincentive to spiralling acts of civil disobedience that could threaten stability, it might also act as a disincentive to those seeking to free ride by professing insincere beliefs about rights.

There is another response to the threat of free riding that may prove more effective in reducing this danger. That response points to the role of the wider democratic community in interrogating and criticizing justifications for civil disobedience in the public sphere.²⁵ According to the theory as it stands at the moment, citizens have a reason to regard acts of civil disobedience as justified if

²⁵ I use the term 'public sphere' simply to denote the wide range of public arenas where deliberation between citizens in a constitutional democracy can take place. This can involve discussion through virtual media, such as the Internet or the mass media, as well as more traditional face-to-face discussion in or outside political institutions. See my brief discussion in chapter 5, section I, below.

they are carried out by protesters who reasonably believe a particular law or policy is unjust. However, they do not have such a reason if they themselves come to believe that protesters are not sincere in their stated beliefs about justice, and in fact have ulterior motives for breaking the law.

There is no guarantee that false arguments or beliefs will be detected, but a vigilant citizenry does stand a good chance of smoking out bogus beliefs about rights. For instance, certain widely known facts about the particular groups engaging in civil disobedience might cast reasonable doubt on the sincerity of their beliefs. Citizens might be suspicious of a group using rights talk as a justification for engaging in civil disobedience against a particular law or policy, when they know it had originally not used rights in its previous condemnations of the law. Alternatively, citizens might be suspicious of a group professing a commitment to rights in this particular instance when those groups have other clear and generally well-known interests in campaigning against a particular law or policy, or have well known prejudices or malicious preferences that might colour their stated beliefs about injustice.²⁶

The suggestion that false or insincere claims can be detected through processes of public deliberation throughout the public sphere has been used by some

²⁶ To take an example, religious groups campaigning against abortion on the grounds that it violates the rights of an unborn child can expect their arguments to be thoroughly investigated to 'smoke out' religiously motivated beliefs. Insofar as their arguments are disputed or debunked, and insofar as a majority within the democratic community suspect that the dissent is in fact religiously motivated, the theory developed here would tend not to be friendly to their act of civil disobedience. The civilly disobedient citizens would be making an insincere appeal to public political principles.

theorists of deliberative democracy to ward off the analogous problem that citizens can manipulate deliberation in their favour. According to Iris Marion Young, 'the only remedy for false or invalid arguments is criticism...the only cure for false, manipulative, or inappropriate talk is more talk that exposes or corrects it' (Young, 2000: 79). The possibility that others will not respect norms of publicity and honesty can never be wholly evaporated through some theoretical argument or institutional mechanism, but it can be downplayed through what John Dryzek calls the 'endogenous mechanisms' of public deliberation (Dryzek, 2000: 42-47). These mechanisms play a role in curtailing some of the potential problems of deliberative democracy, such as manipulation or malicious preferences. In this instance, the possibility of public criticism and interrogation of claims presupposed by all conceptions of deliberative democracy can play a role in removing or reducing the threat of insincere justifications of civil disobedience.

The idea that the wider public has a role to play in detecting insincere beliefs about rights emphasises the generally *deliberative* conception of politics that resides behind the theories of civil disobedience developed by writers like Rawls and myself. Throughout this chapter, reference has been made to the communicative character of civil disobedience, and the role it plays as a mode of expression for citizens concerned about justice. Whilst the wider community can be expected to listen to what protesters are saying, and accept principled justifications of civil disobedience, they should not be uncritical in their response. It is perfectly plausible and desirable to advocate a dialogue between

protesters and citizens – often the establishment of that dialogue is the very aim of the protest. This deliberative dimension will be further developed in the next two chapters. For now, it suffices to say that free riding is at least made harder because of the possibility that other citizens in the public sphere can interrogate and criticize the beliefs of those who engage in civil disobedience, especially to ascertain whether or not groups really do believe that a law violates rights. If citizens are insincere, then it will be harder for them to conceal their hidden motives in the context of widespread discussion and interrogation, particularly in the context of communities where a surplus of information is available about those groups and issues through widely accessible sources like the media or the internet.

In conclusion: whilst it may not be possible to wholly prevent the possibility that some clever, insincere group will manipulate public opinion through using the rhetoric of rights to justify their protest, it is possible to cite the threat of legal sanctions and the role of an alert citizenry as mechanisms that significantly reduce this threat.

Conclusion: Rights and civil disobedience

In this chapter I have discussed the implications of extending Rawls' theory of civil disobedience so that it incorporates as justified acts geared towards campaigning for the political and legal recognition of new rights. I also tried to respond to some problems that emerge by making this move, notably fears about

making civil disobedience too easy to justify, threats to the stability of constitutional democracies, and the prospect of encouraging free riding by groups with insincere beliefs about justice.

In the course of this chapter, a skeletal picture of what it means to justify civil disobedience in a constitutional democracy has emerged, and it is worth summarizing that picture before moving on. Civil disobedience in a constitutional democracy is justified by virtue of the reasonable belief of a protester or group of protesters that a law or policy violates rights, or that the political community should acknowledge the need for new rights. This means that even if other citizens disagree with the protesters about the merits of the particular case (e.g. whether or not the law really does violate rights), they can accept that the protesters acted morally given their different beliefs about the law. This is subject to the protester's belief being sufficiently reasonable – logically sound in some minimal way, being backed up with a coherent notion of what it is to have a right, and reasonably expressed. It is also subject to the protester's belief being sincere – not evidently suspect given any prior statements or commitments on the part of the protester, or subject to any other evidence of falsity.

The idea that civil disobedience can be justified when laws or policies of government appear to violate rights is one that is widely held in the existing literature and one that the theory being constructed here also accepts. However, there still remains the other problem discussed in relation to John Rawls' theory

of civil disobedience, namely that rights-based accounts offer a fairly limited description of the range of circumstances where civil disobedience might be justified. For instance, many new social movements would struggle to articulate their concerns in the language of rights, yet the campaigns carried out by them over the last thirty years have had some very beneficial consequences in terms of publicizing neglected issues and challenging deep-set assumptions. In the next two chapters, the working theory of civil disobedience will be augmented with a fuller account of the circumstances where civil disobedience might become justifiable in a constitutional democracy. This will be done by cashing out some of the brief references already made to democratic ideas, especially the idea of public deliberation as vital component of a healthy democratic state.

Chapter 3: Jürgen Habermas and the democratic theory of civil disobedience

This chapter picks up on the second criticism of Rawls' theory discussed towards the end of chapter 1. It was suggested there that Rawls paid insufficient attention to potential *democratic* justifications for civilly disobedience in a constitutional democracy. In the next two chapters, recent developments in democratic theory will be used as a resource for discussing a democratic dimension of justified civil disobedience.

There has been a proliferation of studies on the idea of *deliberative democracy* in contemporary political and legal philosophy.¹ Most, though not all, of this work has been geared towards questions of institutional design, or developing accounts of public reason. Relatively little attention has been paid to non-institutional means for citizens to engage in or provoke public deliberation; in particular, little attempt has been made to explore the role of unorthodox but common forms of illegal political protest in ongoing processes of public deliberation.² This is perhaps surprising: deliberative democracy is often presented as an account of political legitimacy, so it seems to have a clear bearing on the questions of when citizens should, should not or may not comply with political decisions. One prominent deliberative democrat who has discussed the place of civil disobedience in healthy and robust processes of public deliberation is Jürgen

¹ For a good selection of this work see the papers collected in Bohman and Rehg (1997); Elster (1998b); and Fishkin and Laslett (2003). For concise summaries of the literature on deliberative democracy see Freeman (2000) and Bohman (1998).

² Exceptions are Holloway Sparks (1997) and Iris Marion Young (2003).

Habermas. In this chapter I explore Habermas' writings on the relationship between civil disobedience and the principles that regulate a constitutional deliberative democracy.

The chapter is divided into three sections. The first section briefly elaborates the distinctive way in which Habermas understands deliberative democracy and civil disobedience. Habermas defends a two-track model of deliberative democracy, comprising a formal-institutional sphere geared towards will formation and an informal-non-institutional sphere geared towards opinion formation. Civil disobedience is understood as an extreme means for citizens in the non-institutional sphere to influence the direction of opinion and will formation.

The second section discusses two different answers Habermas gives to the question of how civilly disobedient citizens justify their illegal political protests to the democratic community. On the one hand he sometimes says that citizens can justify civil disobedience by demonstrating its essential *compatibility* with constitutional principles, due to its mooring in discursive practices and its nonviolent, symbolic nature. On the other hand he sometimes says that citizens should justify civil disobedience by claiming that government law or policy has *violated* constitutional principles, for instance by claiming that laws violate constitutionally guaranteed basic liberties. The first answer offers citizens an expansive and permissive method of justification, whereas the second answer offers a more limited and restrictive method of justification. I suggest that

neither of these answers is altogether satisfying as an account of justified civil disobedience in a community governed along Habermasian lines.

The final section explores the theory of civil disobedience developed by Cohen and Arato, which is influenced by Habermas' ideas. The chapter concludes by suggesting that what is missing from both Habermas' theory, and Cohen and Arato's, is an account of the precise relation between the principles of a deliberative democracy and the justification of civil disobedience within such a regime. Such an account would specify the types of democratic inadequacies that would reduce the binding power of democratic decisions and give citizens a moral entitlement to engage in illegal, non-institutional forms of direct action.

I. Habermas on deliberative democracy and civil disobedience

In this section Habermas' theory of democracy and its implications for his approach to civil disobedience will be explored. The section is divided into three parts: (1) an elaboration of the normative underpinning of Habermas' democratic theory; (2) a description of Habermas' two track model of deliberative democracy; and (3) a discussion of the place of civil disobedience in the overall canopy of deliberative democracy.

(1) In adumbrating his model of deliberative democracy, Habermas often contrasts it with stylised liberal and republican accounts.³ Habermas claims that,

³ Habermas' discussion of republican political theory is informed more by the political thought of Rousseau and Arendt than classical republicanism or its recent revival in the writings of Phillip

'According to the liberal view, the democratic process is effected exclusively in the form of compromises among interests' (Habermas, 1996: 296). This process of 'interest compromise' takes place against the backdrop of constitutional protection of liberal basic rights, which are supposed to ensure the fairness of the procedure and justice of the outcomes. In contrast, 'According to the republican view...democratic will formation takes the form of ethico-political self-understanding; here deliberation can rely on the substantive support of a culturally established background consensus shared by the citizenry' (Habermas, 1996: 296). This conception elevates politics above the level of mere interest aggregation, and sees democratic deliberation as a sphere of activity where a whole society identifies itself as a community bound together by ties of mutual recognition and solidarity.

Both the liberal and republican accounts of democracy have a fundamentally different appraisal of the normative dimension of democratic will-formation and its institutionalisation in representative arenas. In Habermas' reconstruction of the republican tradition, he notes its tendency to view citizen opinion and will formation as a process of 'political self-determination' whereby 'the community becomes conscious of itself'. Given that citizens play such a central role in the activity of political self-determination, republicans are led to 'an offensive

Pettit and Quentin Skinner. He tends, therefore, to provide a somewhat stylised account of a kind of 'populist' republicanism, which emphasises the overriding good of democratic participation in a close knit community (Pettit, 1997: 8). In fact, Habermas' ideal of deliberative democracy shares some interesting features with recent conceptions of republicanism: for instance, a shared critique of bias in democratic decision making (Habermas, 1996: 386; Pettit, 1997: 189), a shared defence of a robust role for civil society in democratic life (Habermas, 1996: 366-373; Pettit, 1997: 193-194), and a shared reliance on a conception of 'communicative' or 'discursive' freedom (Habermas, 1996: 119; Pettit, 2001: 70-72).

understanding of politics directed against the state apparatus' (Habermas, 1996: 297). Attempts to institutionalise democracy through representative assemblies and state apparatus are regarded with hostility, as such manoeuvres are alleged to alienate citizens from the law making process and undercut the solidarity-ties of political community.

The liberal tradition, by contrast, views citizen opinion and will formation as only one element in a complex constitutional arrangement of politics. Democratic governance is seen as one means of steering the generation of political power, along with constitutional principles such as the protection of basic liberties, the separation of powers, and statutory controls. In contrast to republicans, liberals adopt a 'state-centred understanding of politics', which foregoes 'the unrealistic assumption of a citizenry capable of collective action' (Habermas, 1996: 298). Whilst this supposedly makes liberals more supportive of constitutional arrangements than republicans, they see the state as a potential enemy when it comes to protecting a private realm of social and economic activity. Liberal constitutionalism, on this account, is as much about curtailing a potentially disruptive and over-mighty state system as it is a defence of a state-centred understanding of politics.

Habermas attempts to steer a middle course between these two conceptions of the democratic process. On the one hand he wants to avoid the idea he ascribes to liberals, that democratic processes are to be understood merely as a mechanism for aggregating interests in accordance with constitutional principles. On the

other hand he wants to avoid the idea he ascribes to republicans, that democratic activity is the means by which a society comes to regard itself as an ethically bounded community. At the same time he wants to retain elements from both conceptions. He wants to retain the liberal faith in *constitutional principles*, in particular the idea that political and legal institutions should guarantee basic liberties and institutionalise popular sovereignty through representative assemblies. He also wants to retain the republican belief in the importance of widespread citizen involvement in ongoing processes of *opinion* and *will formation*.

His solution is to develop a model of deliberative democracy based on public discourse at all levels of society. He says: 'according to discourse theory, the success of deliberative politics depends not on a collective acting citizenry but on the institutionalisation of the corresponding procedures and conditions of communication' (Habermas, 1996: 298). Habermas hopes to show how understanding deliberative politics as a complex mechanism for the institutionalisation of various types of public discourses can yield a normatively attractive and politically feasible ideal.

Given this starting point, Habermas offers a different appraisal of the normative dimension of the democratic process and its institutionalisation in representative arenas. The normative dimension of democracy is initially understood by Habermas in a fairly liberal way. In particular, he elaborates four constitutional principles that would find a place in most liberal accounts of legitimate political

authority: (i) legal protection of basic liberties, (ii) popular sovereignty through representative bodies, (iii) the division of powers, and (iv) separation of state and civil society (Habermas, 1996: 168-176). But he claims that this does not exhaust the normative content of the democratic process. A full understanding of the normative content of democracy embraces the following insight: 'the democratic procedure is institutionalised in discourses and bargaining processes by employing forms of communication that promise that all outcomes reached in conformity with the procedures are reasonable' (Habermas, 1996: 304).

Habermas claims that democratic institutions are normatively defensible not just because they conform to liberal principles like rights and representation, but also through their capacity to facilitate public discourse throughout society and to translate this 'communicative power' into informed political decisions through laws and policies. According to Habermas: 'Deliberative politics acquires its legitimating force from the discursive structure of an opinion and will formation that can fulfil its socially integrative function only because citizens expect its results to have a reasonable quality' (Habermas, 1996: 304). Representative bodies are to be appraised depending on how efficacious they are at generating informed outcomes, as well as the extent to which outcomes respect formal constitutional provisions.

According to Habermas, his account retains liberalism's commitment to constitutional principles and representative bodies, whilst requiring a more robust and reasoned deliberative politics. It also retains republicanism's faith in

inclusive and informed public deliberation, without viewing a democratic people as an ethical community antipathetic towards constitutional procedures and representative bodies.

(2) Habermas attempts to show how a democratic process committed to constitutional principles and rational deliberation can be institutionalised in conditions of social complexity and pluralism. His method is to elaborate what he calls a 'two-track' model of democratic politics. The first track is comprised of formal democratic procedures, such as parliamentary forums, designed to generate solutions to practical problems. Whilst these forums do engage in opinion formation through deliberation, their main *telos* is to generate a democratic *will* that can be given concrete realisation through laws and policies. The second track is a 'procedurally unregulated public sphere', comprised of the general public of citizens and the various associations and networks to which they become affiliated. The *telos* of deliberation throughout the unregulated political public sphere is the generation of *public opinion* through various communicative mechanisms, such as the mass media, internet, and face-to-face discussion in the many forums of civil society.

The two-track model of deliberative politics enables Habermas to endorse something like an informal distribution of cognitive labour throughout the polity. On the one hand formal democratic procedures geared towards will formation are adept at dealing with existing problems and justifying the various solutions adopted. These procedures can draw upon a range of opinions expressed by

representatives, administrative expertise available from civil servants and other public officials, and established mechanisms for resolving potential disagreements, such as majority rule. On the other hand concerned citizens engaged in the comparatively unregulated public sphere are adept at discovering new problems and new ways of looking at old problems. In this sphere of 'unrestricted communication', Habermas claims that 'new problem situations can be perceived more sensitively, discourses aimed at achieving self-understanding can be conducted more widely and expressively, collective identities and need interpretations can be articulated with fewer compulsions than is the case in procedurally regulated public spheres' (Habermas, 1996: 308).

Habermas illustrates the problem finding potential of the unregulated public sphere by analysing various issues and concerns that have been raised by groups and networks in civil society:

Consider, for example, the spiralling nuclear arms race; consider the risks involved in the peaceful use of atomic energy or in other large-scale technological projects and scientific experimentation, such as genetic engineering; consider the ecological threats involved in an overstrained natural environment (acid rain, water pollution, species extinction, etc.); consider the dramatically progressing impoverishment of the Third World and the problems of world economic order; or consider such issues as feminism, increasing immigration, and the associated problems of multiculturalism. Hardly any of these topics were *initially* brought up by

exponents of the state apparatus, large organisations, or functional systems. Instead they were broached by intellectuals, concerned citizens, radical professionals, self-proclaimed "advocates", and the like. (Habermas, 1996: 381)

For Habermas, this 'context of discovery' in the unregulated public sphere augments the 'context of justification' in the regulated sphere of will formation.

In order that the two track model of deliberative democracy can succeed in respecting constitutional principles and producing decisions of sufficiently rational quality, it is crucial that the 'unregulated' public sphere is capable of performing its task and that the 'regulated' sphere is receptive to its various 'discoveries'. In order that the former can fulfil its task it must operate against a background of guaranteed basic liberties, and the absence of social and economic inequalities that distort unfettered communication and allow for relations of power and domination (Habermas, 1996: 308). The state can facilitate this through guaranteeing basic liberties, and implementing economic policies that enable citizens to be free from the effects of power and domination.⁴ In order that information and discoveries in the unregulated public sphere 'feed into' informed political decisions, there must be genuine avenues of communication

⁴ Unfortunately, Habermas is frustratingly vague on how the state should guarantee non-domination and combat 'illegitimate' power. For instance, he does not discuss how much equality, and what kind of equality, is necessary for healthy and just deliberative politics. On this issue see James Bohman (1997), Joshua Cohen (1989), and Knight and Johnson (1997). Nor does he discuss in detail the kind of institutional mechanisms that might allow instances of domination or illegitimate power to be publicised or contested. On this issue see Pettit (1997) 206-240 and Pettit (2001) 167-172.

between civil society and state. The latter must be sensitive to the concerns and issues raised by the former, and endeavour to apply its decision-making powers to new problems and concerns. However, the distinction between the formal and informal tracks of the deliberative process remains. According to Habermas: 'the public opinion worked up via democratic procedures into communicative power cannot rule of itself but can only point the use of administrative power in specific directions' (Habermas, 1996: 300). Civil society must influence deliberative politics through avenues of rational communication, not coercion.

(3) Habermas presents his two-track model of deliberative democracy as an efficacious institutionalisation of the normative dimension of the democratic process.⁵ It also constitutes the starting point for his brief discussion of civil disobedience in *Between Facts and Norms*, and lends some theoretical substance to his earlier discussions of political protest.⁶

Civil disobedience is understood by Habermas as a symbolic form of non-violent and illegal political protest. It is a tactic pursued by concerned citizens in civil society in order to publicise issues and concerns shared by at least some fellow citizens. According to Habermas, civil disobedience represents 'the last means for obtaining more of a hearing and greater media influence for oppositional arguments' (Habermas, 1996: 382).⁷ It is one of the ways in which citizens in a

⁵ For some constructive criticism of Habermas' theory of deliberative democracy, see Elster (1986) 112-120; Fraser (1997) 69-98; Bohman (1996) 172-187; Scheuerman (1999); Cohen (1999); Finnis (1999) and Rehg and Bohman (1996).

⁶ See, for instance, Jürgen Habermas (1985) and (1993) 168.

⁷ In describing civil disobedience as the 'last' means of securing influence, Habermas implies a normative judgement about the limits of protest in a constitutional deliberative democracy. He

constitutional deliberative democracy can contribute to ongoing processes of opinion formation in the informal public sphere and influence will formation in the formal institutional sphere. In this sense civil disobedience is both 'horizontal' in its appeal to other citizens and 'vertical' in its appeal to institutional state actors.

This dual function of civil disobedience is worth stressing. On the one hand civil disobedience communicates messages to other citizens in the informal public sphere of society. It enables concerned citizens to inform other citizens, groups and networks in civil society about their issues and concerns, and stimulate deliberation throughout the informal public sphere. It also serves as a mobilising function for concerned citizens. Campaigns of civil disobedience aim to provoke a response from other citizens, in the form of public support for their cause or perhaps even a decision to formally identify themselves with their cause (for instance through joining the campaign). In this sense, civil disobedience is geared towards energising opinion-formation and enhancing the problem finding and publicity generating functions of the informal public sphere.

On the other hand civil disobedience communicates messages to political actors in the formal democratic sphere of society. It enables concerned citizens to inform legislators about their issues and concerns, and hopefully stimulate opinion and will formation at that level. In particular, it can serve as a means for

suggests that citizens would not be justified in engaging in acts that could be construed as coercive and inimical to ongoing processes of opinion and will formation, such as terrorism (Borradori, 2003: 41-42).

citizens to protest against laws and policies that they regard as unjust, or for citizens to raise the profile of an issue of concern they want to see addressed by formal deliberative bodies. In this sense, civil disobedience is geared towards keeping open the necessary channels of communication between informal and formal processes of opinion and will formation (Habermas, 1996: 382-384).

As an example of the dual function of civil disobedience, consider the campaigns carried out by the gay rights and AIDS awareness network ACT UP.⁸ Civil disobedience campaigns perform two roles for ACT UP. On the one hand they are a means of conveying their concerns to other persons in civil society, in the hope of stimulating a response and heightening awareness of issues such as health care for AIDS sufferers. In particular, by engaging in high profile acts of civil disobedience, ACT UP hope to raise their own profile in the eyes of persons who may share their concerns but be unaware of the existence of their organisation. Protest actions serve as a means of mobilising and organising communities of persons with shared interests and concerns. On the other hand civil disobedience campaigns are a means of speaking directly to those who hold political power. By engaging in publicity generating acts, ACT UP attempt to push issues onto the agenda and encourage political actors to take an active interest in a range of gay and AIDS related issues. Protest actions serve as a means of campaigning for new legislation or policy initiatives, or as a means of persuading political actors to rethink existing legislation or policy initiatives.

⁸ ACT UP has carried out civil disobedience within various constitutional regimes, especially America, from around the late 1980s onwards. For an account of ACT UP's history, agenda and campaigns of civil disobedience see Sawyer (2002).

This conception of public deliberation is crucial for democratic justifications of civil disobedience in constitutional regimes. This is because such regimes already provide institutional avenues to participate in lawmaking processes, such as voting in free elections. The idea of majority rule is often invoked as an argument in favour of general compliance with laws and policies generated through democratic processes. Majority rule is a generally accepted mechanism for resolving political disagreement and coming to a decision. Provided that the process that led to the majority decision was fair, then everyone who participated within that process should accept the result (Rawls, 1972: 356; Dworkin, 1985: 110-111).⁹

Habermas' conception of democracy allows a response to the idea that democratic decisions reached via majority rule must be binding on all citizens. According to the conception of democracy defended by Habermas, majority rule is only a *part* of the democratic process. Majority rule must be accompanied by widespread and informed public deliberation, including a sufficiently robust interaction between the two different tiers of the deliberative republic (Habermas, 1996: 179-180). If that deliberation is absent, or can be challenged in some way, then the binding power of majority decisions may be sufficiently weakened to create the conditions for justified civil disobedience (Habermas,

⁹ Ronald Dworkin says that rights based theories of civil disobedience have a response to the argument for compliance to majority rule. He says that because human rights are generally viewed as immune from the will of the majority, then those who refuse to comply with rights violating laws are not acting undemocratically. Rather they are appealing to the idea, reflected in practices like judicial review, that rights must be protected if democracy is to be viewed as a means of respecting the freedom and equality of citizens (Dworkin, 1985: 111).

1985: 111). If we accept Habermas' view that majority rule is not definitive of the democratic process, then it becomes possible to counter the charge that civilly disobedient citizens are acting undemocratically if they campaign against majority decisions. Far from flouting democratic practices, civilly disobedient citizens are contributing to ongoing the public deliberation that, according to Habermas, is so essential for a healthy and robust democratic politics.

In summary: Habermas situates civil disobedience within a broader picture of deliberative politics. Civil disobedience is part of the activity of ongoing opinion formation in the unregulated public sphere. Ideally, engagement in civil disobedience will always be orientated towards enhancing public deliberation, both in formal democratic institutions and throughout the various forums and associations in the unregulated public sphere. In this sense, civil disobedience is connected to the overall aim of making deliberative politics function in such a way that its decisions are sufficiently informed, by contributing to the circulation and testing of information throughout the public sphere.

II. Habermas on the justification of civil disobedience

In this section, I move from a sympathetic description of Habermas' theory to a more critical commentary on ambiguities and imperfections in his account of justified civil disobedience. In particular, I take a closer look at Habermas' account of how citizens should *justify* civil disobedience in a Habermasian deliberative democracy. I suggest that, through reading what Habermas has to

say about the justification of civil disobedience, two different accounts of justification are forthcoming. Broadly speaking, the first account offers a fairly *expansive* justification of civil disobedience, whereas the second account offers a more *restrictive* account of justified civil disobedience. In what follows I discuss the expansive justification of civil disobedience suggested in some parts of Habermas' text (1), the more restrictive justification suggested at other parts (2) and explain why neither account is wholly satisfactory as an account of justified civil disobedience (3).

(1) First I explain the expansive interpretation of Habermas' justification of civil disobedience. When discussing the justification of civil disobedience in a deliberative democracy, Habermas sometimes speaks as if what makes this form of illegal protest politically justifiable is its *compatibility* with the constitutional principles that regulate such a society. The compatibility is marked by a self-reflexive attitude on the part of protesters about the nature of their action and how it relates to broader practices of opinion and will formation, and by the symbolic non-violent character of the action.

When protesters engage in civil disobedience, in order to stimulate opinion formation throughout the informal public sphere and persuade political actors to change law or policy, they are engaged in activity that, although illegal, nonetheless coheres with the principles that underlie a free flow of information and ideas in a deliberative republic. According to Habermas, 'civil disobedience is...always an implicit appeal to connect organised political will-formation with

the communicative processes of the public sphere'. The message conveyed by the civilly disobedient action is 'aimed at a political system that, as constitutionally organised, may not detach itself from civil society and make itself independent vis-à-vis the periphery' (Habermas, 1996: 383).

Civil disobedience coheres with the idea that organised opinion and will formation in representative assemblies should not proceed independently of the opinions and concerns expressed by citizens in civil society. Civil disobedience is one of the ways in which citizens can ensure healthy channels of communication between the formal and informal sites of public deliberation, with a view to offering strongly held opinions or relevant information as in-puts to opinion and will formation. In this sense, civil disobedience represents an attempt to make ongoing opinion and will formation more informed and more democratic, by connecting institutionalised deliberation with the opinions and concerns of citizens.

Civil disobedience also coheres with the principles of a deliberative democracy by virtue of what Habermas describes as its purely symbolic and non-violent nature. Habermas emphasises this theme in his discussion of the civil disobedience campaign carried out by the German peace movement in the early 1980s. From their public statements he claims to discern 'a conviction that acts of protest – even if they represent calculated infringements of rules – can have only a symbolic character and may be executed solely with the intention of appealing to the capacity for reason and sense of justice of the majority in each

particular case' (Habermas, 1985: 99). The non-violent and symbolic nature of civil disobedience in a constitutional democracy is supposed, from this perspective, to offer a less fundamental challenge to procedures of opinion and will formation than more thoroughgoing acts of resistance (Rawls, 1972: 367-368; Black, 1970: 20-21; Frazier, 1972: 316-318; Betz, 1970: 15-16; Martin, 1993: 211-212). By respecting norms of non-violence, protesters do not engage in a de-stabilising power play with the state by challenging its monopoly over coercive force within society. Moreover, the symbolic character of an act denotes a commitment to a moralised conception of communication and argumentation, which holds that processes of opinion formation throughout civil society proceed according to reason and persuasion, not force or coercion.

It should now be clear why I refer to this as an 'expansive' justification of civil disobedience. This justification of civil disobedience is expansive because it potentially tolerates a wide range of civil disobedience *provided* that civilly disobedient citizens identify with the idea of deliberative democracy. This means that civil disobedience should be geared towards stimulating deliberation within and between state and civil society and that civil disobedience should remain strictly symbolic and non-violent. Provided these minimal requirements are met, civilly disobedient citizens can campaign over any number of issues and concerns. Such campaigns are justified by virtue of their contribution to ongoing processes of opinion and will formation. Citizens are expected to offer a 'self-referential' justification for civil disobedience that 'refers to its own origins in a civil society that in crisis situations actualises the normative contents of

constitutional democracy in the medium of public opinion and summons it against the systematic inertia of institutional politics' (Habermas, 1996: 383).

(2) There is, however, a more restrictive interpretation of Habermas' justification of civil disobedience. On this interpretation, civil disobedience is not justified by virtue of its mere compatibility with the norms of a deliberative democracy. Rather, civil disobedience is justified only as a response to *violations* of constitutional principles by government. This adds an extra condition to the justification of civil disobedience in a constitutional deliberative democracy. Civilly disobedient citizens have to make a case that their illegal act is justified in the light of government law or policy that violates principles implicit in the constitutional regulation of power.

Habermas alludes to this condition of justification in the following comment on civil disobedience: 'acts of non-violent, symbolic rule violation are meant as expressions of protest against binding decisions that, their legality notwithstanding, the actors consider *illegitimate* in the light of valid constitutional principles' (Habermas, 1996: 382-383). It is also alluded to in his defence of prominent historical practitioners of civil disobedience: 'Thoreau and Martin Luther King were not absolutising their own private convictions, but rather protesting against the *transgression of valid constitutional principles*' (Habermas, 1985: 107). This justification establishes a tight connection between civil disobedience and constitutional principles. On this interpretation it would

be unjustifiable to violate laws for any reason other than a violation or transgression of constitutional principles by government.

The clearest example of this would be when a law or policy violated constitutionally protected basic rights. Indeed, as Habermas acknowledges, both Thoreau and Martin Luther King were engaged in civil disobedience against laws and policies that they reasonably believed constituted clear and serious violations of civil rights. Habermas seems to recommend this method of justifying civil disobedience by focusing on the way in which civil disobedience is carried out in order 'to realise the *system of rights* anew in changing circumstances...to interpret the system of rights better, to institutionalise it more appropriately, and to draw out its contents more radically' (Habermas, 1996: 384). When Habermas discusses civil disobedience as a response to transgressions of constitutional principles, or an attempt to 'interpret the system of rights better', he foregrounds constitutionally protected basic rights, not the channels of communication between informal and formal opinion and will formation. On this interpretation, it is still fair to say that citizens are attempting to reconnect state institutions with opinions and concerns expressed in the informal public sphere, but only in the *specific circumstances* where citizens believe that the actions of the state have violated basic rights. The primary justification of civil disobedience is not that citizens are reconnecting formal and informal processes of opinion formation, but that political decisions have violated constitutional basic rights.¹⁰

¹⁰ This interpretation is suggested at another point where Habermas considers the justification of civil disobedience, when he claims that in a constitutional state 'independent courts and the whole body of citizens (in extreme cases activated through civil disobedience) decide sensitive questions regarding *unconstitutional measures*' (my emphasis but text in brackets is Habermas's);

At this point, the justification for civil disobedience that Habermas advocates begins to look more like the one suggested by John Rawls. According to Rawls, civil disobedience is justified when citizens conscientiously believe that government law or policy clearly and substantially violates equal liberties enshrined by constitutional conventions and his theory of justice. Citizens have a case for disobedience when the moral reasons that support a duty of general compliance with law no longer hold, or hold with less force than they ordinarily would. As we saw in chapter 1, this account can be criticised for downplaying the potentially *democratic* character of civil disobedience, and for flattening the distinction between justified civil disobedience and constitutional testing.

It might be argued that when Habermas speaks of civil disobedience as a response to violations of constitutional principles we should understand such violations in a broader way than I have suggested. In particular, we should not assume that violations of constitutional principles only apply to violations of basic rights, and not also to violations of constitutional democratic principles. On such a broader reading, groups in civil society can justifiably engage in civil disobedience when state institutions are insufficiently connected or engaged with informal processes of opinion formation in civil society. When this happens, the state has 'violated' the principle that it must be sufficiently sensitive and receptive to the opinions and concerns of its citizens.

Habermas, 1998: 199). The idea that civil disobedience is a response to allegedly unconstitutional measure implies that the laws and policies citizens oppose through this means of protest are those that allegedly violate procedural or substantive norms pertaining to the protection of basic rights.

As I shall suggest later, such a reading might be productive for a deliberative theory of civil disobedience. There are difficulties, however, with offering such a reading on the basis of what Habermas *actually says* in his writing on civil disobedience. Firstly, such a reading goes against the grain of Habermas' tendency to foreground basic rights when discussing what constitutes a violation of constitutional principles. Secondly, and more seriously, Habermas does not provide an account of how decision making bodies might violate deliberative principles, or how laws and policies might be produced in an insufficiently deliberative fashion. For instance, Habermas does not illustrate what constitutes a sufficiently healthy relation between state and civil society, or illustrate the kinds of political or social forces that might undermine that relationship. If we were to extend the meaning of a violation of constitutional principles so that it incorporated alleged breakdowns in communication between state and civil society, we would need some sort of account of what those breakdowns would consist in.

In the absence of such an account, it seems reasonable to conclude that when Habermas speaks as if civil disobedience is only justified when laws and policies violate constitutional principles, he intends to denote circumstances where citizens reasonably believe that the state has violated or is failing to recognise basic rights implicit in the constitutional process. This reading is more restrictive than the expansive reading, where civil disobedience gains its justification from its mere compatibility with constitutional principles.

(3) The expansive and restrictive interpretations of Habermas' theory offer two different accounts of how citizens justify civil disobedience in a constitutional democracy. If nothing else, this suggests that Habermas does not elaborate the justification of civil disobedience in a sufficiently clear way. In order to derive a clear Habermasian theory of civil disobedience, it would be necessary to decide which of these justificatory strategies offers the most suitable basis for deliberative civil disobedience. In fact, as they stand neither of these justifications for civil disobedience is entirely satisfying. The expansive reading appears to make civil disobedience too easy to justify, whereas the restrictive reading appears to make civil disobedience too difficult to justify.

On the one hand, if we accept the expansive justification of civil disobedience, then we seem to make this form of activity too easy to justify in a constitutional democracy. This is because provided that civilly disobedient citizens can claim that their non-violent act constitutes a contribution to ongoing opinion and will formation, we are committed to viewing their act as politically justifiable. Given that the aim of *all* acts of civil disobedience, at least according to Habermas, is to raise public awareness of an issue or concern and illicit some kind of response from other citizens, then it appears hard to say when civil disobedience could ever be *unjustified* on this account (Habermas, 1996: 382). Civilly disobedient citizens can claim that their act is justified as a means of encouraging deliberation within and between state and civil society. The publicity generating function of civil disobedience, and its tendency to provoke a dialogic response

from other citizens, means that symbolic civil disobedience always has a prima facie justification within a Habermasian deliberative democracy.

As an account of justified civil disobedience, this answer is unsatisfying. This is not just because of the counter-intuitive conclusion that civil disobedience will always be justified over any issue, and in almost all circumstances. Justifying civil disobedience by virtue of its mere compatibility with constitutional principles does not explain why civil disobedience, rather than institutional or legal forms of protest, is a suitable means of raising issues and concerns for public deliberation. The aim of encouraging deliberation and raising awareness of an issue may be laudable and beneficial to deliberative politics, but it is not altogether obvious, on this account, why these aims cannot be achieved through more orthodox forms of political participation. By simply resting the justification of civil disobedience on its symbolic and publicity generating dimensions, we lose sight of the specific failings or weaknesses in political institutions that undermine the reasons for complying with law. We lose sight of why citizens believe that they are morally entitled to *disobey law* as part of their protest.

At least the restrictive interpretation, which makes justification depend upon violations of constitutional principles, can provide answers to this question. According to the restrictive reading, civil disobedience can be justified along the lines suggested by Rawls and Dworkin, because rights violating laws weaken the case for legal compliance (Rawls, 1972: 372; Dworkin, 1985: 111). Laws and

policies that violate basic liberties can reasonably be assumed to make equal participation in existing institutions harder. If laws and policies violate political liberties (for instance voting rights) then citizens may simply not be able to make use of institutional means of contesting decisions. Alternatively, if laws and policies violate non-political liberties, citizens might cite this as evidence of bias or prejudicial interests at work in the institutions and claim a moral justification in taking their protest outside of those institutions. The expansive account of civil disobedience lacks these kinds of normative resources.

On the other hand, if we adopt the restrictive justification of civil disobedience, then this form of protest appears to become *too difficult* to justify in a Habermasian deliberative democracy. By requiring civilly disobedient citizens to justify their act by citing violations of constitutional principles, this form of protest will be limited to fairly specific circumstances. In particular, on a Rawlsian reading of this condition, civil disobedience would be limited to clear and substantial injustices, when civilly disobedient citizens can make a clear appeal to the 'sense of justice' of the majority. The kind of injustices that Rawls has in mind are instances where laws or policies constitute injustices that should be clear to all, such as withholding equal protection of the law, restricting freedom of speech or conscience or preventing a minority from voting in elections (Rawls, 1972: 372). As argued in the first chapter, such an account can be criticised for its restrictive interpretation of justified civil disobedience.

The restrictive account is even more unsatisfying when set against the backdrop of Habermas' theory of deliberative democracy. Recall that the function of civil society is to discover and publicise new problems facing society. Habermas cites ecological concerns, the development of genetically modified foodstuffs, and problems of global economic governance, amongst others (Habermas, 1996: 381). Social movements campaigning over these kinds of issues have frequently engaged in a combination of institutional and extra-institutional activity to publicise their concerns. Often symbolic acts of civil disobedience have been especially effective in capturing public attention and influencing the tone and content of public debate. In this sense, civil disobedience has played a role in allowing civil society to function in the way Habermas wants it to, namely as a 'pathfinder' for society. But if justified civil disobedience is limited to violations of constitutional principles, then it would be difficult to see how groups in civil society could legitimately engage in protest action over the kind of new problems in society that they detect. This is because no clear appeal can be made to violations of basic liberties.¹¹ Rather, groups are protesting the lack of consideration given to a range of policy concerns or opinions that they view as important for the general good of society as a whole. Restricting civil

¹¹ There may be a few exceptions to this: as argued in the last chapter, environmental concerns might be expressed in terms of person-centred rights, such as a right to a healthy environment for all citizens (above, pp. 84-86). It should be noted, though, that protest geared towards raising ecological concerns might not always be easily expressible in these terms. For instance, part of the green critique of existing conceptions of ethics and justice, and of many current social and political practices, is that they are focused exclusively on human interests (Elliot, 1995: 8). One of the aims of a green critique might be to challenge this focus on human life, at the expense of the intrinsic value of diverse eco-systems. Protest here would be best justified in a constitutional democracy as an attempt to provoke deliberation and reflection over the scope of justice, and the relation between human beings and the rest of the natural world.

disobedience to violations of constitutional principles undermines their capacity to do this.

In summary: Even though Habermas' conception of deliberative democracy appears promising as a resource for constructing a theory of civil disobedience, there is an ambiguity concerning how citizens can justify civil disobedience. Either civil disobedience is justified by virtue of its compatibility with constitutional principles, in which case it becomes too easy to justify, or civil disobedience is justified as a response to violations of constitutional principles, in which case it becomes too difficult to justify.

III. Towards a deliberative democratic theory of civil disobedience

In order to provide a clear and appealing account of justified civil disobedience in a deliberative democracy, it is necessary to iron out the inconsistencies in Habermas' theory and avoid the unattractive implications of either being too permissive or too restrictive. In this section, I explore how we might go about achieving both of these goals. Initially, I explore the theory of civil disobedience elaborated by Jean Cohen and Andrew Arato, which is heavily influenced by Habermas' ideas and seeks to offer an unambiguous democratic justification for illegal protest activity (1). After concluding that Cohen and Arato's theory suffers from similar objections to the expansive interpretation of Habermas' theory (2), it is suggested that what we need is a thorough account of the *circumstances* where civil disobedience would be a reasonable course of action for citizens in a deliberative democracy (3).

(1) In *Civil Society and Political Theory* Jean Cohen and Andrew Arato defend a view of the political process similar to that presented by Habermas in *Between Facts and Norms*. Though the authors do not employ the terminology of deliberative democracy, they do defend a conception of democracy that is based on a politics of dialogue and reason giving (Cohen and Arato, 1992: 585). In particular, they follow Habermas' two-tier model of democracy by describing and defending the role of *civil society*. Civil society is comprised of the various associations and networks that people form and join, with the intention of engaging in inter-personal activity. In complex constitutional democracies, Cohen and Arato suggest that civil society can play a vital role as a forum for people to form and express public opinions. According to their theory, civil society contains within it a radically democratic spirit. That democratic spirit is reflected in the opportunities for *participation* in a wide range of social activities and public organisations, and the *publicity* of ongoing processes of public deliberation and opinion-formation (Cohen and Arato, 1992: 419). The authors suggest that this radical democratic spirit can be harnessed in ongoing endeavours to make other spheres of activity – such as the economy and the representative state – more democratic.

Cohen and Arato claim that in order for civil society to flourish, a liberal state guaranteeing basic liberties is necessary. Such liberties are necessary (though not sufficient) conditions for allowing citizens the freedom to associate with one another, and the freedom to form and express opinions through public discourse.

As well as providing the legal framework for civil society, the state must also remain receptive to the concerns and opinions of associations within civil society. Like Habermas, the authors regard healthy channels of communication between civil society and representative assemblies as an important litmus test of democratic legitimacy. Institutional political actors should engage with associations in civil society, particularly when associations and groups express considered concerns and opinions about the direction of state policy (Cohen and Arato, 1992: 412, 416). A willingness to listen to and engage with civil society is one way of trying to ensure that democratic decisions really do reflect the interests and concerns of the democratic community. In particular, it ameliorates concerns that parliamentary assemblies are too distant from the citizens they govern, or that political parties in contemporary democracies are too homogenous, self-interested or influenced by private money to reflect the wide range of opinions amongst their constituents.

In their theory of civil disobedience, Cohen and Arato defend illegal protest as a legitimate way of contributing to an ongoing process of democratisation.¹² According to them: 'collective actors involved in civil disobedience invoke the utopian principles of constitutional democracies, appealing to the ideas of fundamental rights or democratic legitimacy' (Cohen and Arato: 1992: 588). Focusing on the idea of democratic legitimacy, Cohen and Arato say: 'there are counterfactual democratic principles, upon which our political institutions

¹² The authors concede that civil disobedience is also justified as a response to rights-violation or as part of a campaign for new rights, but warn against focusing purely on this aspect and not also on its democratic justification. (Cohen and Arato, 1992: 586).

nevertheless rest, that can be appealed to when the democratic character of decision making that superficially seems to respect the procedural principles of majority rule is challenged, and that can justify acts of civil disobedience aimed at further democratising a decision making process' (Cohen and Arato: 1992: 600).

In contrast to Rawls, and the restrictive reading of Habermas' justification of civil disobedience, this clearly and unambiguously indicates that in a constitutional democracy civil disobedience can be justified on democratic grounds. Cohen and Arato argue that civil disobedience is a means for citizens to challenge the democratic legitimacy of laws and policies that are passed in representative bodies. The authors discuss the example of German anti-nuclear protesters, in particular the civil disobedience campaign against the decision of the Bundestag to allow stationing of U.S. Pershing II missiles on German soil in 1983. They claim that this act should be seen as a protest against the 'democratic or representative quality of the political society that made the policy decision' (Cohen and Arato, 1992: 587). In particular, the campaign should be seen as a protest against the nature of the democratic deliberation that preceded the decision (see also Habermas, 1985: 109).

(2) Cohen and Arato are certainly clearer than Habermas' in acknowledging a democratic justification of civil disobedience, whilst being strongly influenced by his writings on deliberative democracy and communicative action.¹³ Despite

¹³ Cohen and Arato frequently discuss Habermas' ideas throughout the course of their 600-page argument.

this, the account of democracy and civil disobedience that they offer is still not entirely satisfactory. The reason is that they provide an insufficiently robust account of the circumstances where civil disobedience becomes a justified means of contributing to ongoing processes of democratisation. In this sense the democratic justification of civil disobedience is akin to the expansive interpretation of Habermas' theory.

The authors occasionally refer in passing to the kind of circumstances where civil disobedience might be especially justified. They refer briefly to civil disobedience as a justified response to 'misunderstandings of popular will, inadequate representations of public opinion, or insufficient considerations of the relevant issues' (Cohen and Arato, 1992: 574). If these ideas were elaborated upon, they might serve as a foundation for a robust account of democratically justified civil disobedience. This is because they describe situations where the democratic process might be reasonably criticised for manifesting failings that weaken the binding power of its decisions. A political justification of civil disobedience in these circumstances would cite these failings as reasons for disobedience. Protesters might claim that one of the moral reasons we have for complying with democratic decisions – for instance that the process through which the decisions were made was sufficiently informed – does not obtain in particular circumstances, creating the possibility of justified disobedience. However, in the absence of a fuller account of the principles that confer democratic legitimacy on political decisions, it is not possible to provide a robust account of the justification of civil disobedience. We lack an account of the

kinds of violations of these principles that might create the conditions for justifiable civil disobedience.

Rather than provide such an account, Cohen and Arato tend to speak in general terms about the relationship between civil society and the state. They claim that: 'democratisation...means keeping the channels of communication and influence between civil and political society open' (Cohen and Arato, 1992: 603). Civil disobedience is justified when citizens claim that they are seeking to close the gap between institutionalised deliberation and informal opinion formation in civil society. As argued in the last section, the problem with this is that almost *any* act of civil disobedience can be justified on these terms. Civil disobedience is always orientated towards influencing the direction of deliberation and decisions. Protesters are always trying to secure a hearing for their views and publicise their concerns to a wider audience. Given that any and all acts of civil disobedience can reasonably be described as publicity generating attempts to influence ongoing deliberation, then it seems that any and all acts of civil disobedience must be justifiable. As mentioned above this fails to explain why civil disobedience, rather than other means of securing political influence, is especially justifiable.

To put the point another way: Cohen and Arato's theory does not offer a persuasive account of the arguments that other citizens of a democratic community are likely to accept as justifiable grounds for civil disobedience. Remember that in constitutional democracies citizens usually obey the law

because it secures a measure of stability combined with sufficiently just and democratically legitimate laws. In order to recognise a potentially disruptive act of civil disobedience as justified, other citizens will want to know the reasons why protesters felt entitled to engage in it. It will not be enough simply to say that the act is geared towards enhancing deliberation or influencing political actors. Other citizens might reasonably charge that this would make *all* acts of civil disobedience justified, and complain that unless there are specific factors that have frustrated the normal channels of influence between civil society and state, other means of stimulating deliberation should be pursued. In order to provide a persuasive justification of civil disobedience, protesters should be able to describe what it is about their grievance that makes their illegal actions especially appropriate. Such a justification would provide some explanation of why civilly disobedient citizens believed that they could set aside the normal reasons for compliance with law.

This is where having a fuller account of democratic principles would be helpful. Protesters might cite specific circumstances or factors that frustrate the normal democratic processes. For instance, they might claim that existing institutions are being unreceptive to new ideas or opinions because of the influence of entrenched powerful interests. Alternatively, they might claim that existing assumptions or practices are frustrating attempts to publicise new issues or concerns, or to introduce new and salient information as in-puts to ongoing deliberation. A justification that appealed to *specific inadequacies* in existing deliberation and decisions might provide a firmer, more persuasive justification

because it secures a measure of stability combined with sufficiently just and democratically legitimate laws. In order to recognise a potentially disruptive act of civil disobedience as justified, other citizens will want to know the reasons why protesters felt entitled to engage in it. It will not be enough simply to say that the act is geared towards enhancing deliberation or influencing political actors. Other citizens might reasonably charge that this would make *all* acts of civil disobedience justified, and complain that unless there are specific factors that have frustrated the normal channels of influence between civil society and state, other means of stimulating deliberation should be pursued. In order to provide a persuasive justification of civil disobedience, protesters should be able to describe what it is about their grievance that makes their illegal actions especially appropriate. Such a justification would provide some explanation of why civilly disobedient citizens believed that they could set aside the normal reasons for compliance with law.

This is where having a fuller account of democratic principles would be helpful. Protesters might cite specific circumstances or factors that frustrate the normal democratic processes. For instance, they might claim that existing institutions are being unreceptive to new ideas or opinions because of the influence of entrenched powerful interests. Alternatively, they might claim that existing assumptions or practices are frustrating attempts to publicise new issues or concerns, or to introduce new and salient information as in-puts to ongoing deliberation. A justification that appealed to *specific inadequacies* in existing deliberation and decisions might provide a firmer, more persuasive justification

for civil disobedience. Rather than claiming that civil disobedience is always justified as an attempt to connect civil society and state, civil disobedience would be seen as politically justified in circumstances where that relationship had broken down in some particular way, or where other democratic principles had been violated.

(3) Whilst they offer promising resources for a working theory of civil disobedience, the democratic accounts of civil disobedience that I have discussed throughout this chapter tend to suffer from certain weaknesses. In particular, these theories are often sketchy about the precise way in which civilly disobedient citizens should appeal to democratic principles. Consequently, they tend not to explain why civil disobedience, rather than more orthodox forms of political participation, might become an especially justified method of contributing to ongoing deliberation.

One way of avoiding this weakness would be to pursue the method suggested above. One could set out the fundamental principles of a deliberative democracy, and suggest certain circumstances where violations of those principles weaken the case for compliance with democratic decisions. In the first chapter the scope for democratic justifications of civil disobedience was briefly explored by engaging with ideas about the fair value of political liberty expressed in Rawls' theory of justice (see above pp. 66-72). It is also possible to use Habermas' theory of deliberative democracy in order to work out a more robust democratic justification of civil disobedience. In particular, two themes that might provide

normative resources for this task are (i) processes of public deliberation that are maximally free from illegitimate power, and (ii) processes of public deliberation that are sufficiently informed.

(i) In Habermas' theory of deliberative democracy, laws and policies are said to be legitimate provided that they emerge out of a process of uncoerced and informed discussion. As well as providing a normative defence of deliberative democracy, Habermas also provides some reflections on how democratic deliberation can be institutionalised in contemporary social and economic conditions. A dangerous tendency that threatens the realisation of deliberative politics, is the vulnerability of political processes of opinion and will formation to the circulation of social power possessed by privileged interests in society (Habermas, 1996: 150). According to Habermas:

The constitutionally regulated circulation of power is nullified if the administrative system becomes independent of communicatively generated power, if the social power of functional systems and large organisations (including the mass media) is converted into illegitimate power, or if the lifeworld resources for spontaneous public communication no longer suffice to guarantee an uncoerced articulation of social interests' (Habermas, 1996: 386).

When institutionalised in conditions of inequalities of political power and resources, democratic deliberation risks becoming hijacked by powerful actors

with the capacity to steer debate in such a way that outcomes reflect their interests. Habermas' conception of illegitimate political power invokes similar concerns to those expressed by John Rawls about the effects of failing to secure the fair value of political liberties.

(ii) In order for democratic decisions to be sufficiently legitimate, it is important that they are the result of a constitutionally organised process of democratic will formation, in which the will of the community can emerge free from the distorting effects of illegitimate power. It is also necessary for processes of democratic opinion and will formation to be capable of channelling relevant information and concerns into democratic decisions. The cognitive dimension of the democratic process was stressed in the outline of Habermas' conception of deliberative democracy presented in the first section. Democratic decisions are not defended simply by virtue of majority rule, or procedural fairness, but also by virtue of the quality of the deliberation that preceded them. Citizens in complex societies accept democratic decisions as binding because they are presumed to be of a sufficiently reasoned quality. Habermas is trying to capture the sense in which democratic legitimacy presupposes both free and uncoerced participation in deliberation *and* deliberation capable of channelling reasons and information into democratic decisions. If deliberative assemblies do not accept as in-puts to deliberation all relevant information and opinions, then this can be cited as evidence of failings on the part of these institutions.

These two themes of *uncoerced* deliberation and *informed* deliberation might be used as the basis for a theory of deliberative civil disobedience. In particular, they offer criteria for *criticising* democratic deliberation and decisions. If citizens reasonably believe that laws or policies are not the result of uncoerced deliberation but of illegitimate power, or not the result of informed deliberation but uninformed deliberation, then these failings might be cited as evidence that the binding power of decisions is weakened.¹⁴ The normal reasons that citizens have for complying with democratic decisions – that the deliberation preceding them was uncoerced and informed – would not apply or apply with less force than usual.

Moreover, citizens might cite specific failings on the part of actual deliberation as evidence that existing institutional means of political participation are inadequate. These failings might explain why non-institutional direct action becomes an especially justified, perhaps even necessary, means of contributing to ongoing deliberation. In the next chapter I develop these ideas by developing a deliberative theory of civil disobedience. The theory suggests that civil disobedience can be justified not just as a response to rights violations, or as part of a campaign for new basic rights, but also as a response to breakdowns in the deliberative process.

¹⁴ I presume again that the beliefs of protesters should be reasonable. In this case reasonableness is applied to beliefs about the democratic process, rather than rights. Protesters must back up their belief with evidence, second order beliefs about democracy, and a reasonable disposition.

Conclusion: Deliberative democracy and civil disobedience

In this chapter the potential for a democratic theory of civil disobedience was explored by investigating the work of Jürgen Habermas and Jean Cohen and Andrew Arato. The guiding intuition behind the democratic theory of civil disobedience is the same as the intuition behind the criticism of Rawls' theory, and other liberal accounts of civil disobedience, expressed at the end of the first chapter. The idea is that as well as disobeying the law because it violates basic rights, another justifiable reason for disobeying the law might be that it is insufficiently democratic. The problems in the accounts suggested by these authors are that they are either ambiguous or lack a sufficiently robust account of the kind of democratic inadequacies which might create the conditions for justified civil disobedience. The next chapter develops a more robust account of democratic civil disobedience. The resource for such an account is a deliberative conception of democracy, informed in part by ideas expressed by Habermas and discussed in this chapter, especially the idea of uncoerced and informed public deliberation. In order to sketch an account of deliberative democracy, reference will be made to a wide range of deliberative democratic and civic republican theories.

Chapter 4: Democracy, deliberation and disobedience

In the last chapter I explored the relationship between democratic practices and civil disobedience. The possibility of using democratic ideas as a basis for justifications of civil disobedience was assessed through reflecting on the work of Jürgen Habermas and Jean Cohen and Andrew Arato. Though their theories lacked a robust and clear account of justified civil disobedience, their ideas were useful in emphasising aspects of democracy that might illuminate discussions of civil disobedience. In particular, ideas associated with *public deliberation* are prominent in their accounts of public and illegal protests in constitutional democracies. The authors discussed in the last chapter tended to agree on the idea that civil disobedience should be seen as an attempt to contribute to and influence ongoing processes of public deliberation over the direction of government law and policy.

In this chapter the idea of public deliberation is taken as a starting point for developing a theory of civil disobedience as *deliberative contestation*. The idea is to sketch the basic principles of a deliberative democracy, and argue that certain tendencies within actual deliberation might frustrate the realisation of these principles and create the conditions for politically justifiable civil disobedience. The hope is to provide a more complete theory of civil disobedience than Habermas or Cohen and Arato, in particular by offering a more detailed account of its justification in a deliberative democracy. An important point is to emphasise that the account of civil disobedience developed

Chapter 4: Democracy, deliberation and disobedience

In the last chapter I explored the relationship between democratic practices and civil disobedience. The possibility of using democratic ideas as a basis for justifications of civil disobedience was assessed through reflecting on the work of Jürgen Habermas and Jean Cohen and Andrew Arato. Though their theories lacked a robust and clear account of justified civil disobedience, their ideas were useful in emphasising aspects of democracy that might illuminate discussions of civil disobedience. In particular, ideas associated with *public deliberation* are prominent in their accounts of public and illegal protests in constitutional democracies. The authors discussed in the last chapter tended to agree on the idea that civil disobedience should be seen as an attempt to contribute to and influence ongoing processes of public deliberation over the direction of government law and policy.

In this chapter the idea of public deliberation is taken as a starting point for developing a theory of civil disobedience as *deliberative contestation*. The idea is to sketch the basic principles of a deliberative democracy, and argue that certain tendencies within actual deliberation might frustrate the realisation of these principles and create the conditions for politically justifiable civil disobedience. The hope is to provide a more complete theory of civil disobedience than Habermas or Cohen and Arato, in particular by offering a more detailed account of its justification in a deliberative democracy. An important point is to emphasise that the account of civil disobedience developed

here *augments* the rights based account developed in the first two chapters. By the end of the chapter it is hoped that we will have an account of how civil disobedience in a constitutional democracy might be justifiable as a response to alleged rights violations, as a campaign to assert new rights *and* as a response to frustrations of deliberative principles.

The chapter is divided into three sections. The first section offers a general outline of deliberative democracy. The outline brings together themes in the existing literature on deliberative democracy and places special emphasis on the ideas of democratic inclusion, reason giving through public deliberation and informed public debate. In the second section a theory of civil disobedience as deliberative contestation is developed by applying the idea of deliberative democracy to the issue of whether and when illegal protest against democratic decisions might become justifiable. Civil disobedience as deliberative contestation suggests that citizens can justify civil disobedience when actual deliberation has been insufficiently inclusive, when powerful participants have unduly influenced deliberation, and when deliberation has been insufficiently informed. The third section briefly discusses how using the idea of public deliberation places restrictions on the issues and concerns protesters raise as potential in-puts to ongoing deliberation.

I. The principles of a deliberative republic

The deliberative theory of civil disobedience proceeds by presenting an account of the fundamental principles of a deliberative democracy, and then discussing the kinds of violations of these principles that might justify principled acts of civil disobedience by citizens. In this sense, the account pursued here is similar in method to that of Rawls. Rawls' theory provides an account of fundamental principles of justice, and discusses the kinds of political violations of these principles that create the conditions for justified civil disobedience. The theory developed here also follows Rawls' method in assuming that its prescriptions apply to a society where there is general commitment to the principles of a deliberative democracy, but in which serious violations of those principles nevertheless occur.¹

One difficulty in developing a deliberative theory of civil disobedience is that there are many conceptions of deliberative democracy within the existing literature, several of which conflict with one another in their normative prescriptions and interpretations of the deliberative ideal. In order to try and get round this problem, in this section I present some fairly general principles that are shared by a family of conceptions. The aim is not to provide a robust

¹ I recognise that this raises questions about the extent to which the theory applies to actually existing democratic states, where there may or may not be widespread commitment to the kind of principles discussed below. Whilst I cannot defend this claim fully here, I submit that something like the principles of deliberative democracy suggested below would command a large degree of support as a normatively appealing interpretation of existing democratic arrangements. I hope that the discussion in section II of this paper will prove intuitively attractive as an account of the kind of justifications for civil disobedience that might at least appear reasonable when advanced in the public spheres of actually existing democratic states (see my discussion of the relevance of Rawls' theory above: pp. 40-43).

justification or institutional blueprint for deliberative democracy, nor a thorough treatment of how these principles might be interpreted. The aim is, rather, to delineate the basic principles of a deliberative democracy and use them as a guide for discussing the justification of civil disobedience within a deliberative republic. Given that aim, I focus on the kinds of reasons citizens might have for *criticising* actual deliberation and deliberative outcomes, given the requirements loosely set by the principles. Generally speaking, the principles seek to reflect a conception of democracy as an association of free and equal citizens, who come to an agreement or at least a decision about the proper exercise of political power after reasoned, inclusive and informed public deliberation.

(1) The first principle shared by most conceptions of deliberative democracy is that *public deliberation should include all members of the relevant political community*. Deliberative democracy shares with most normative accounts of democracy the idea that political power should be forged through collective decisions taken by those who are governed by that power (Cohen, 1997b: 407). This means that all citizens must be allowed to participate in processes of public deliberation and have some kind of voting rights within the democratic community. In practice, this might translate as an entitlement to engage in public debate with fellow citizens at different levels of the deliberative process (for instance public forums or associations in civil society) and an entitlement to vote for representatives in public elections (Pettit, 2003: 139; Habermas, 1996: 170).

Despite the fact that almost all accounts share a commitment to democratic inclusion, there is scope for disagreement over the *scope* of inclusion. Joshua Cohen, for instance, is adamant that inclusion is based on whether or not persons are *governed* by the relevant democratic institutions, not on whether or not persons are merely *affected* by the decisions of those institutions (Cohen, 1997b: 432ff). This is based on the idea that democratic procedures are a necessary condition of exercising legitimate political authority over persons, not mere influence over persons. Other accounts provide a rather different interpretation of inclusion. Iris Marion Young claims that democratic decisions are only legitimate if everyone *affected* by the decisions is incorporated in the process of decision-making (Young, 2000: 23). 'Affected' is defined as having one's options for action significantly conditioned by democratic decisions. The idea has some affinities with Philip Pettit's belief that political power should not arbitrarily interfere or 'dominate' citizens. This means that political power must not be exercised in such a way that the interests of all those seriously affected are not consulted, providing the basis for norms of inclusion and opportunities of contestation (Pettit, 1997: 190-194). The idea of including all those who might be affected by democratic decisions is potentially more expansive than including all those governed by democratic decisions. Democratic decisions might have serious implications for many citizens *outside* of the relevant democratic community; for instance national decisions about foreign policy, immigration policy or trade policy seriously affect persons in other nation-states.

Disagreement over whether and how to include all those affected by decisions is widespread, and often figures in arguments about the desirability of all-inclusive global or cosmopolitan democratic institutions (Held, 1995: 21-22). The 'democratic boundary problem' is, of course, an entrenched problem for democratic theory that I cannot resolve here (Shapiro and Hacker-Cordón, 1999). In order to suggest grounds for criticising actual deliberation, I offer a principle that captures the spirit of including relevant interests in deliberation, without setting unreasonable institutional expectations. Actual deliberation can be reasonably criticised if it excludes *persons* who are directly governed by the power generated via that deliberation, and/or if it neglects the *interests* of anyone outside the relevant political community who is seriously affected by the outcome of that deliberation. This captures the importance, noted by Cohen above, of everyone governed by political power being included within the procedures that generate that power. It also captures the importance of relevant interests being acknowledged and respected in deliberation, even if for practical reasons it is impossible for the persons or groups with those interests to be included. For instance, it would be unrealistic to expect nations like the U.S. to allow all those who are affected by its policies a vote in its national elections. However, it should not be unrealistic to expect deliberation to at least take into account the interests of those who might be affected outside of the democratic community. It would be a valid criticism of deliberation within a bounded political community if it blatantly disregarded the interests of those outside the community who are seriously affected by the outcomes.²

² I tend to agree with cosmopolitans that globalisation is making nation-states increasingly inter-dependent, and that states face increasingly global problems that may necessitate international

(2) The second principle of deliberative democracy is that *citizens must publicly deliberate with one another on the basis of their sincere and reasonable beliefs to decide law and policy*. The significance of deliberation is that decision-making is conceived as a matter of persuasion and reason giving, not coercion or aggregating preferences. By focusing on deliberation, the democratic process is invested with stronger normative connotations than would be the case if it were conceived as a process of aggressive bargaining or preference aggregation. This approach makes democracy a more normatively appealing idea by guarding against the threat that interests in powerful bargaining positions might unduly influence decisions; reason and argument should win the day rather than entrenched power or aggressive bargaining (Cohen, 1997a: 74).

Generally speaking, the idea of public deliberation has at least two specific dimensions. The first dimension has to do with a certain ideal of *democratic citizenship*. Citizens in a deliberative democracy are supposed to be committed to discussing and voting their beliefs about political decisions that best reflect the general interest, not just their own private interests (Kymilcka, 2002: 293). Conceptions of deliberative democracy do not necessarily have to explicate a particular notion or ideal of the general interest, but they do insist that participants to deliberation are concerned to discover policies that best reflect the general interest (Pettit, 2003: 140). Citizens in a deliberative democracy are also

democratic institutions (Habermas 2002: 59-60). In the long-term it is surely not enough to rely on the goodwill of states taking into account other peoples' interests; though in the absence of effective international institutions, moral pressure could productively be brought to bear through appealing to 'cosmopolitan' norms like the one above.

supposed to be committed to processes of persuasion through reason giving. The aim of public deliberation is to reach agreement or mutual understanding with fellow citizens about the direction of public policy. This does not necessarily mean that achieving a rational consensus is a precondition of decisions having democratic legitimacy. Procedural mechanisms like majority rule are appropriate means of resolving disagreements, in order that lawmaking processes are not brought to a standstill (Habermas, 1996: 171,179). It does mean that citizens should take as a regulative ideal the *aim* of reaching agreement through reason, entailing a commitment to the give and take of reasons and beliefs about public policy. Some deliberative democrats claim that this ideal should be substantiated through an account of *public reason*, which places restrictions on the content or guidelines over the conduct of public deliberation over certain political questions (Rawls, 1999a). I return to the idea of public reason, and its implications for justified civil disobedience, in section III.

The second dimension has to do with the appropriate background conditions of public deliberation, in particular avoiding excessive inequalities in political power. Political power is understood as the opportunity to influence the course of public deliberation, set the agenda for discussion and influence the outcome of discussion. Most theories of democracy accept that absolute equality of political power is both an impossible goal and perhaps an undesirable one, because some citizens in a deliberative democracy are more likely to pursue political influence than others given their differing conceptions of the good (Dworkin, 2000: 190-200; Dryzek, 2000: 172-173). Nonetheless, there is general commitment to

achieving a fair opportunity to influence democratic deliberation for all citizens, and a firm commitment to avoiding excessive inequality of political power. The reason is that public deliberation is conceived as a process of unforced dialogue in which citizens are able to advance their views free from coercion or intimidation (Pettit, 2003: 139-140). Situations where some citizens are powerful enough to influence the course and outcome of deliberation tend to frustrate the sense in which public dialogue is free of such potential coercion or intimidation. It frustrates the sense in which decisions are made on the basis of reasons and also the sense in which decisions should track general public interests, rather than particular private interests of powerful participants.

In order to secure the conditions necessary for uncoerced public deliberation, deliberative democrats generally endorse both the legal protection of basic liberties and a guarantee of the fair value of those liberties. Basic liberties guarantee, amongst other goods, freedom to vote in elections, freedom to advance views and opinions in deliberative arenas, freedom to associate with other citizens, freedom to petition government, and freedom to access materials and information necessary to form considered judgments about public policy. They provide a guarantee that no citizen will be legally or politically barred from engaging in processes of public deliberation, and from having the chance to exercise some influence over the outcomes of deliberation, through the election of representatives and institutional opportunities to contest political decisions.

Mindful of the fact that basic liberties tend to ensure only formal freedoms, deliberative democrats also insist that citizens are able to exercise an effective influence over public deliberation. The first chapter explored Rawls' insistence on guaranteeing the fair value of the political liberties, through re-distributive measures if necessary. A reason for guaranteeing the liberties in this way is to guard against the threat that powerful participants to deliberation might dominate proceedings, or steer deliberation in such a way that it reflects their own interests over and above the common interest (Rawls, 1972: 226; Daniels, 1975b: 256-258). This mirrors Habermas' concern to reduce the effect that illegitimate power has on the course and outcome of public deliberation (Habermas, 1996: 327-328), and Pettit's concern to avoid relations of domination within and between society and political forums (Pettit, 1997: 172-174).

Avoiding the effects of inequalities in political power is a common theme in discussions of the relation between deliberative democracy and social justice (Cohen, 1989; Bohman, 1997; Knight and Johnson, 1997). Though there is disagreement over how to regulate the effects of power inequalities, there is general commitment to the idea that public deliberation must be maximally free from the effects of inequalities in a democratic community. The reason is that if democratic deliberation is vulnerable to the distorting effects of inequalities in power, then reason giving is no longer the driving force of democracy. The ideal of public deliberation is frustrated, as power inequalities constrain and limit public discussion. It is perhaps worth mentioning that most theorists of deliberative democracy believe that current patterns of inequality in

constitutional democracies frustrate the ideal of public deliberation in this way (Pettit, 1997: 194; Dworkin, 2000: 202; Bohman, 1996: 140; Young, 2003: 110).

(3) The third principle of deliberative democracy states that in order to at least try and ensure that policy decisions are of a requisite quality, *participants should seek to incorporate and assess as much relevant information and data as possible within ongoing processes of public deliberation*. This principle tries to capture in a weak sense the intuition, shared in much of the recent literature, that a full defence of democratic deliberation will include some reference to the epistemic quality of deliberation. The previous chapter discussed the strong cognitive reading of democracy presented by Habermas, who claims that 'deliberative politics acquires its legitimating force from the discursive structure of an opinion and will formation that can fulfil its socially integrative function only because citizens expect its results to have a reasonable quality' (1996: 304). Phillip Pettit says that contestation and deliberation provide an important function in allowing 'the requirements of reason [to] materialise and impose themselves', implying that decisions should be sufficiently informed about all relevant interests and attempt to track the 'common good' (Pettit, 1997: 201 and 278). Iris Marion Young defends her 'inclusive' model of deliberative democracy on the grounds that it allows decisions and deliberation to be more knowledgeable about social problems and relevant concerns (Young, 2000: 79 and 115). John Dryzek contends that deliberative democracy can be defended on the grounds that it contains the 'epistemic dimension' of being the best means of sorting good arguments from bad (Dryzek, 2009: 173-174).

Theorists disagree over whether the epistemic quality of democratic decisions should figure as a primary value in justifications of the deliberative ideal, and if it does, how this epistemic quality should be guaranteed. Having established that several theories of deliberative democracy do make reference to the epistemic quality of democratic deliberation, it is possible to suggest an answer to these two questions. The answers are informed by the weak epistemic account of deliberative democracy suggested recently by David Estlund (1997).

First, the quality of decisions reached through public deliberation can figure in justifications of the deliberative ideal, but only as *part* of an overall justification of deliberative democracy. It is also important that deliberative democracy is fair and open to all citizens, for instance, by applying the principle of inclusion discussed above.³ It is not sufficient to justify deliberative democracy purely by virtue of the quality of the decisions likely to be reached through deliberative procedures (Estlund, 1997: 174, 195-196). If those decisions are not reached in a way that conforms to sound convictions about the scope for popular participation in law-making processes, then they are unlikely to be regarded as legitimate by those governed by them.⁴

³ On the tendency for deliberative democrats to justify public deliberation through reference to a range of principles, some relating to the morality or fairness of procedures and/or outcomes and some relating to the epistemic value of procedures and/or outcomes see Bohman (1998): 407-408.

⁴ It is assumed here that the securing the epistemic dimension of procedures must be achieving in such a way that other principles figuring in justifications of the deliberative ideal are respected. It cannot be achieved through violation norms of democratic inclusion, for instance.

Second, in order to try and ensure that democratic decisions are of a sufficiently strong quality, deliberative democracy should be organised in such a way that its *procedures* are likely to yield informed outcomes. This implies arranging and regulating democratic procedures in such a way that a wide range of information, opinions and data are likely to circulate and be subjected to informed testing and interrogation by citizens (Estlund, 1997: 190-191). This might be consistent with state regulation of political debate to ensure that a full range of opinions and ideas can circulate, and that loud or powerful voices in deliberative arenas do not silence or suppress different points of view (Fiss, 1998: 5-26). It may also be consistent with a cognitive division of labour within a democratic community, and attempts to foster the deliberative capacities of citizens through education and other policies (Hurley, 2000: 192-193). Designing procedures in this way does not guarantee that democratic outcomes will always be right, but it does attempt to ensure that outcomes will be right more often than not (Estlund, 1997: 187).

The principle of informed public deliberation, then, constitutes a part of an overall justification of deliberative democracy, not the whole, and pertains to the quality of procedures of public deliberation, rather than outcomes.⁵ It suggests that a wide circulation of information and the testing of that information through public deliberation will at least more likely than not lead to more informed outcomes. Widespread and inclusive public deliberation is a means of allowing a

⁵ In this sense, the principle is not part of what Estlund calls a 'correctness theory of democratic legitimacy', which demands that outcomes must be 'correct' in order to be democratically legitimate. As Estlund suggests, this principle should be rejected as too demanding on democratic practices (Estlund, 1997: 181).

substantial amount of potentially relevant information to enter into the public sphere. It also allows for that information to be criticised and assessed in the public realm by other groups and citizens. Given the tendency for deliberative democracy to produce (ideally) more informed decisions, and given that several theories seem to incorporate this idea in general defences or justifications of the deliberative ideal, then it may be reasonable to criticise actual deliberation if it is seriously uninformed by all relevant considerations. For instance, if deliberation and decisions regarding various policy areas does not consider a range of competing considerations and information, then this may constitute grounds for saying that deliberation and decisions are likely to be inadequately informed. Alternatively, if actual deliberation simply ignores relevant information about policy questions that are of clear importance for that community, this may constitute grounds for disputing the efficacy of actual deliberation. The fact that deliberative democracy should be more informed means that it can be legitimately criticised for failing to channel and process relevant data.

To summarise, three principles common to many models of deliberative democracy are: that deliberation be sufficiently inclusive, that deliberation consists of reason giving against the backdrop of fair social and economic conditions, and that deliberation aim to be sufficiently informed about issues relevant to the common interest. My aim is not to derive an institutional blueprint from these principles, which would require far more discussion, but to identify the kind of grounds that citizens might have for criticising actual deliberation. If deliberation offends against these principles in some way, then it might be

legitimately criticised and the binding power of its institutions and decisions weakened. In the next section, I suggest ways in which these deliberative principles can be applied to the problem of when groups might justifiably engage in civil disobedience against democratic decisions.

II. Civil disobedience as deliberative contestation

In this section I sketch a theory of civil disobedience that locates this form of protest within ongoing public deliberation over political issues throughout the democratic community. The theory developed here is characterised as *deliberative contestation*. It is deliberative in that it is geared towards contributing to ongoing deliberation in the public realm, and it is contestation in that it constitutes a challenge to perceived failings on the part of actual deliberation. Whilst it is neither possible nor desirable to spell out all the conceivable circumstances when civil disobedience becomes a potentially justified means to enter into ongoing deliberation, it is possible for a deliberative contestation account to suggest certain circumstances where civil disobedience becomes especially justifiable.

Before proceeding to discuss the circumstances where civil disobedience becomes especially justifiable in a deliberative democracy, it is worth stressing the precise sense in which civil disobedience constitutes a contribution to deliberative politics. In particular, a feature mentioned in the last chapter in relation to Habermas' theory of civil disobedience should be signalled. That

feature is that civil disobedience as a communicative act has both a vertical and a horizontal dimension.

The vertical dimension is the intention on the part of the civilly disobedient citizen to open up a channel of communication and influence between civil society and the political state. A citizen engages in civil disobedience to persuade the state to enter into a dialogue about law and policy in the light of perceived failings in existing deliberative procedures. The hope to is to persuade the state to engage in deliberative uptake, by encouraging a response on the part of political actors to concerns expressed within civil society. The horizontal dimension is the intention on the part of the civilly disobedient citizen to stimulate processes of communication and dialogue within civil society itself. A citizen engages in civil disobedience to communicate concerns to other citizens in civil society, in order to raise awareness of issues and hopefully support for his or her viewpoint. On some occasions, associations in civil society might be one of the targets of a civil disobedience campaign, in which case the message communicated has critical intent and is aimed at stimulating a response on the part of the targeted group. The vertical and horizontal dimensions relate to the two-track model of deliberative democracy defended by Habermas, and pick up on his idea that civil disobedience is aimed at both influencing processes of will formation in law-making bodies and processes of opinion formation throughout civil society (see above: pp. 135-137).

It is also worth emphasising the sense in which civil disobedience represents an act of political contestation. The idea of contestation has been elaborated in great detail recently by Philip Pettit in his studies on republicanism (Pettit, 1997: 183-205; Pettit, 2001: 163-174). For Pettit, contestation is a mechanism whereby citizens can challenge political decisions if they believe that those decisions constitute interference that does not track their relevant interests and ideas, or if they believe that decisions fail to track 'common avowable interests'. In Pettit's formulation, contestation is not the same as a veto; those who contest decisions must persuade others that they have a sound argument. Also, contestation should be used to model various procedural, consultative, and appellate mechanisms so that contestation becomes a routine part of political life, not primarily a process of popular protest and struggle.

Civil disobedience as deliberative contestation shares the republican focus on the scope for challenging political decisions and procedures.⁶ Civil disobedience does not operate like a 'veto', but gives concerned citizens the chance to persuade other members of the democratic community to change their mind about a particular policy or law. One difference is that republicanism emphasises *institutional* mechanisms of contestation, whereas deliberative contestation

⁶ Whilst deliberative contestation does not directly employ the language of non-domination, many of its recommendations cohere with this republican ideal. In particular, the language of non-domination would be a powerful way of substantiating the first and second principles of deliberative democracy. Non-domination seeks to avoid situations where powerful actors can arbitrarily interfere in the lives of other persons; in other words, it seeks to prevent interference that does not track the interests of affected persons (Pettit, 1997: 66-68). The deliberative principles recommending inclusion and non-bias can both be characterised as attempts to reduce the threat of such domination: inclusion allows a voice for potentially affected parties to articulate their interests, non-bias allows criticism of policies that might unfairly favour one party's interest over another.

emphasises the role of *non-institutional* forms of contestation. This is a difference in emphasis only: Pettit recognises the role of public protest and popular movements as a vehicle of contestation (Pettit, 1997: 195). Moreover, deliberative contestation recognises the value of institutional mechanisms of contestation. The justificatory strategy it endorses is geared towards explaining why civilly disobedient citizens believe that existing institutional mechanisms are unavailable to them, or biased against them in some way.

The rest of this section explores the circumstances where civil disobedience becomes especially justifiable in a constitutional democracy, and addresses the question of what a political justification of civil disobedience would look like in these circumstances. According to the account developed here a political justification consists of the reasonable belief of a protester, expressed to others in the democratic community, that existing deliberation can be criticised for violating the deliberative principles discussed in the first part of this chapter. The fact that existing deliberation is reasonably believed to violate deliberative principles in this way weakens the binding power of democratic decisions.

There may be several conceivable ways that actual deliberation might violate the three principles discussed in the last section. It would be difficult to try to document all the possible ways in which deliberation might become so deficient that disobedience becomes politically justified. However, the deliberative contestation theory highlights at least three kinds of situations where actual deliberation can be contested for failing to respect deliberative principles. The

three circumstances are: (1) when a person governed by deliberative institutions is excluded from deliberation, or when the interests of seriously affected persons have been neglected by actual deliberation, (2) when a powerful interest has been able to distort or bias the direction and outcome of existing deliberation, and (3) when actual deliberation has proceeded with insufficient or no information over a particular issue.

(1) The first circumstance refers directly to the deliberative principle regulating a norm of *inclusion* in deliberation. Deliberation can be criticised if any persons who are governed by the relevant political authority were excluded from the processes of deliberation that generate political power. Exclusion takes place when some groups are explicitly prevented from taking part in democratic politics, for instance through disenfranchisement. This might occur in clear-cut situations where political rights to vote are withheld, or where electoral procedures are alleged to make easy and effective voting harder for particular citizens or groups of citizens. Citing the black population in American society as an example, Iris Marion Young says that the 'Civil Rights movement exposed cumbersome and discriminatory voter registration rules in the United States, and struggles continue over the ease or difficulty of access to voting' (Young, 2000: 54). In a situation like this a group cannot effectively vote for its interests to be represented in ongoing deliberation, and therefore civil disobedience becomes a justifiable alternative means for it to advance its interests.⁷ It should be noted

⁷ It might be suggested that the kind of clear exclusion discussed here – exclusion from any or at least effective participation in public elections – is not the only way in which deliberative democracy might violate the principle of inclusion. Theorists such as Young and Bohman have discussed the ways in which pervasive power inequalities might exclude less powerful citizens

that in these circumstances a justification for civil disobedience might be more effectively articulated in terms of basic rights. Citizens engaged in civil disobedience could defend their actions on the grounds that their political rights – in particular their voting rights – are violated by discriminatory electoral laws or practices.⁸

Exclusion of those governed by deliberation is not the only way in which actual deliberation might violate the principle of inclusion. Deliberation may also violate that principle if it neglects the interests of those who will be seriously affected by the outcomes. This criticism is particularly pertinent because those persons whose interests may be neglected are not able themselves to articulate their concerns in the relevant deliberative arenas and institutions. This may not be because of malicious exclusion, but simply because those persons reside in different nations or continents. In these situations, it would be defensible if groups within the deliberative community, acting on behalf of these persons, engaged in civil disobedience to highlight the lack of consideration given to their interests.

This dimension is especially significant in the context of powerful nations whose decisions over a range of policy areas are likely to have profound impacts upon the interests and livelihood of persons in other regions of the world. There are a

from *effective* participation, even though they are *formally* included in deliberative politics. Whilst this is true, these kinds of grievances are here defended as responses to violation of the second principle of deliberative democracy. This idea is substantiated below.

⁸ I assume that civil disobedience against these kinds of exclusionary policies and practices will tend to be indirect, as it would be difficult to violate the offending laws themselves, and so could not be defended as constitutional testing.

number of instances where this scenario might arise. The most obvious is perhaps when a nation decides to go to war against another nation, or a group of nations. If the war is considered unjust or aggressive by significant portions of persons within the aggressor nation, then it might be justifiable to engage in civil disobedience to publicise the potential harm the action will bring to the people under attack. Another example might be where powerful industrial nations fail to regulate pollution levels sufficiently, thus risking damages to the environment that will affect not just its own people, but a global citizenry that has little or no influence over the decision-making processes of those powerful industrial nations. Civil disobedience within those powerful nations might highlight the moral responsibility of its leaders and citizens to take into account the interests and opinions of all those who are likely to be seriously affected by their political decisions. Another example might be the range of areas where powerful nations are accused of exploiting the populations of other nations. Deliberation over trade or aid policy within and between powerful nations might be legitimately criticised if it violates the norm of taking into account the interests of all those affected by its decisions; for instance, those who may be employed by corporations in poorer nations, or those who are dependent on goods and resources from rich nations. It will be especially serious if more powerful countries are reasonably perceived as benefiting from current patterns of global inequality.

A recent example of civil disobedience motivated by concern for the interests of non-national citizens is the campaign by students in the U.S. against the use of

sweatshop labour. The protest network United Students Against Sweatshops (USAS) formed in response to concerns about the working conditions of the labourers contracted to produce collegiate apparel (for instances, hats, sweatshirts and other items of clothing bearing the university logo). Much of the campaign centred on dissatisfaction with the lack of bite behind codes of conduct for the clothing manufacturing industry, which tended to be enforced through industry 'self-monitoring'. Students campaigned, often alongside women's groups and labour unions, to persuade their universities to back an alternative monitoring agency – the Worker Rights Consortium (WRC) – set up by human rights groups, unions, and scholars. The idea behind the WRC was to establish a body free from industry influence, geared towards helping workers in sweatshops organise and pursue complaints.

The campaign to promote the WRC involved a combination of institutional networking with university bodies and non-violent direct action. Often the direct action was pursued as a way of making it difficult for university administrations to ignore the issue or to drag their feet over action. An example was the employment of the civil disobedience tactic of 'sit-ins' in order to force the issue onto university agendas – a successful example of this is the campaign carried out by students at the University of Pennsylvania in 2000 (Featherstone, 2002: 19-20). Whilst USAS' campaign has retained its focus on the production of university apparel, the publicity generated by the campaign has had the knock-on effect of raising awareness about the general working conditions of labourers in

'developing' countries, particularly those employed by Western owned corporations (Scholte, 2000: 222-226, Harvey, 2000: 66).

A brief point here is that by endorsing civil disobedience carried out to promote the interests of persons outside of the relevant deliberative community, deliberative contestation makes some appeal to *cosmopolitan* principles and ideals. An idea that frequently figures in cosmopolitan thought is that all human inhabitants of the globe should enjoy moral standing, irrespective of their nationality or any other differing characteristics (Pogge, 2002: 169; Habermas, 1998: 180-181). In some recent developments of the cosmopolitan ideal, the idea of global interconnectivity has been advanced to support the promotion of cosmopolitan political and legal institutions that can effectively safeguard the interests of a global citizenry. David Held claims that the fates of many citizens are 'interlocked in networks of economic, political and environmental interaction'. In these circumstances, Held advocates a 'cosmopolitan orientation' that enables persons to escape having their quality of life 'shaped and determined in near or far-off lands without their participation, agreement or consent' (Held, 1995: 228). Andrew Linklater develops a norm of cosmopolitan citizenship based upon 'the duties and loyalties which link individuals with an extraordinary range of associations [that] extend from the city to the whole of humanity' (Linklater, 1998: 204).

Civil disobedience aimed at protesting the exclusion of interests of affected non-national citizens from public deliberation appeals to these cosmopolitan

sentiments. It enjoins a bounded deliberative community to acknowledging its responsibilities towards those who will be affected by its decisions but who cannot represent their interests in its processes of public deliberation. This kind of civil disobedience may be particularly necessary in the absence of effective cosmopolitan or transnational institutions. Without these institutions there is little to prevent powerful democratic communities from excluding the interests of non-members and making decisions purely on the basis of national interest. Whilst civil disobedience is a poor alternative to effective global institutions with binding power, it can at least function as a means of bringing *moral* pressure to bear on powerful democratic communities.⁹

(2) The second circumstance where disobedience might become justified is when powerful groups are able to manipulate or bias the course and outcome of public deliberation to promote their own interests. When this happens, the principle that law and policy is to be decided by processes of public deliberation is violated. When powerful participants to deliberation exploit their position to bias proceedings they frustrate the principles of deliberative citizenship and the background conditions of healthy public deliberation.

First, by exploiting power advantages participants are not primarily engaged in deliberative processes of reason and persuasion. They are not seeking to persuade other participants that their opinion should be accepted as the best or most reasonable view about the direction of public policy for the deliberative

⁹ In appendix II I briefly elaborate the increasing relevance of cosmopolitan ideas for the theory and practice of civil disobedience.

community. Rather, they are avoiding public argument in favour of more direct means of exerting influence over the course of public deliberation, such as exercising their political or financial clout. Even if powerful participants do engage in processes of public deliberation, if they are *also* attempting to influence debate through non-deliberative means then their commitment to public deliberation as the primary means of influencing the direction of public policy can be reasonably questioned.

Second, by exploiting power advantages participants frustrate the background conditions of healthy deliberation free from the constraints of inequalities in political power. If participants are able to influence the course of deliberation in their favour, then they enjoy a significant advantage not shared by the majority of participants to deliberation. Whereas most citizens have to depend on their capacity to advance arguments and offer persuasive reasons in favour of their opinions, powerful participants can call on more resources of political power to achieve their goals. In this sense, processes of public deliberation that afford everyone a roughly equal chance to influence deliberation are undermined by power inequalities facilitating manipulation and bias.

Powerful participants may exercise disproportionate influence over deliberation for a variety of reasons. One of the most obvious reasons is that they benefit from inequalities in basic resources such as capital and education. Certain groups may be able to use financial clout to buy advertising time for their view, ensure greater access to or control of mass media, or even to ensure direct access

to and influence within political parties. Alternatively, some groups will, by virtue of their education, be able to perform better in deliberative forums and manipulate discussion so that it reflects their own interest. James Bohman describes unequal influences on decisions and discussions, which emerge as a result of inequalities in resources such as capital and education, as manifestations of 'deliberative inequality' (Bohman, 1996: 110). Iris Marion Young believes that any deliberative politics taking place against the background of structural inequalities in resources like capital and political influence, for instance as manifested in the power of financial clout, will be subject to reasonable criticism from those who do not enjoy these advantages (Young, 2003: 110-111).

In these circumstances, civil disobedience might become a justified means for groups to respond to the biasing effects of deliberative inequalities on discussion and decisions. Bohman, Pettit, Young and all discuss the role of popular protest in publicising the tendency of certain groups to dominate discussion at the expense of others. According to Bohman, 'small acts of contestation can...be generalised into protests and become a public challenge to the existing distribution of deliberative resources and institutions' (Bohman, 1996: 137). Civil disobedience becomes a tactic whereby groups can publicise particular instances where a powerful group has been able to either dominate deliberation or influence outcomes, and make general reference to deep-seated inequalities in deliberative resources throughout the polity. According to Pettit 'it is absolutely necessary in a contestatory democracy that people should be able to coalesce around group identities that were previously suppressed' (Pettit, 1997: 195).

Protest and popular movements are an important resource for groups to protest their unequal status within a democratic community. Young claims that 'creative acts of civil disobedience often force power to become naked'. (Young, 2000: 175). Political protest such as civil disobedience is often an effective means of exposing existing sources of power within constitutional regimes. A symbolic and attention grabbing protest can be an effective means of highlighting just how powerful certain groups in society are, and just how effective they can be in dominating deliberation over certain areas.

As a communicative act, civil disobedience as a response to bias in deliberation is directed at state actors and civil society. The protest is against formal processes of public deliberation that are vulnerable to non-deliberative pressures such as powerful interests. The protest is also intended as a wake-up call to other deliberative actors in civil society, and may also be a direct protest against the group or participant to deliberation who has manipulated deliberation.

An example that recurs again and again in the literature of deliberative democracy is the capacity of corporations to exercise disproportionate influence over democratic discussions and decisions (Pettit, 1997: 194; Dryzek, 2000: 94; Young, 2000: 54; Bohman, 1996: 140). As well as influencing debate through purchasing media time and influence, it is also claimed that corporations can influence the direction of government policy through such mechanisms as the threat of capital flight if confronted with policies that they disapprove of (Bowles and Gintis, 1986: 87-90; Lindblom, 1982: 324-336; Offe, 1984). Sometimes, the

very threat of capital flight is enough to keep certain policies off the deliberative agenda: political actors fear that if policies supposedly contrary to corporate interests are even seriously considered and discussed, this may be enough to provoke capital flight. The kind of protest and civil disobedience recently carried out by groups associated with the so-called 'anti-capitalist movement' respond to this situation by seeking to publicise the power of corporations and the inability or unwillingness of governments to seriously challenge them. This example can be generalised to take in civil disobedience against any group within (or even beyond) the deliberative community that can exercise unequal influence over the course of democratic deliberation.

(3) The third circumstance where the deliberative contestation account might sanction civil disobedience against actual deliberation is when that deliberation has been insufficiently informed by all relevant considerations or opinions. Clearly this circumstance pertains primarily to the third principle of public deliberation, which requires that deliberation be sufficiently informed. The idea is not that democratic deliberation necessarily will produce the best outcomes, but that it should be sufficiently receptive to and inclusive of the information and opinions relevant to particular policy areas, in order to make it more likely that its decisions will be good and informed. If there is evidence that deliberation is not sufficiently adept at channelling relevant inputs to deliberation, then there may be grounds for contesting the pedigree of that deliberation. The deliberative contestation account takes this emphasis on improving the quality of public

deliberation, and tries to adduce some circumstances where this aim might justify civil disobedience as a publicity-generating tactic.

There are many ways of contributing to processes of public deliberation, and seeking to introduce relevant concerns and information. In particular, there are many institutional and legal means of raising issues and concerns: lobbying representatives, publicity raising campaigns, employing media such as the internet to disseminate information. A political justification for civil disobedience aimed at enhancing the quality of deliberation should explain why these normal means of raising concerns are not appropriate or available. To use the terminology introduced by Habermas in the last chapter: protesters should explain why, in their view, the normal channels of communication and processes of argumentation between and within civil society and state are inadequate enough to justify stepping outside normal institutional practices and engaging in civil disobedience.

Civil disobedience as deliberative contestation suggests that there may be specific failings on the part of ordinary deliberative practices that might weaken the efficacy of standard institutional and legal means of participating in deliberation. Two circumstances have been suggested already: both exclusion and bias can reasonably be said to frustrate the aim of achieving well-informed public deliberation. Exclusion of interests is likely to reduce the informational resources for deliberation, and will lead to important viewpoints being neglected (Young, 2000: 116-117). Exclusion also makes it harder for those persons or

interests to be represented through normal institutional means, creating the need for extra-institutional activity like civil disobedience. Bias or manipulation of deliberation will likely frustrate the aim of reaching informed decisions based on a reasoned evaluation of opinions and evidence (Hurley, 2000: 192-193). It also weakens the claims of established institutions over those who lose out as a result of bias or manipulation: it is unlikely that losers will feel comfortable engaging in institutions when biases in those institutions work against their interests and viewpoints.

There may be other circumstances where a wide circulation of relevant views, opinions and information is being frustrated in such a way that civil disobedience might be an appropriate response. One phenomenon that might create the conditions for justified civil disobedience would be the presence of deep-seated assumptions or ways of thinking about policy issues that are shared by many political actors and groups in civil society. It might be alleged that the presence of these attitudes and assumptions serve to frustrate the circulation and serious consideration of opposing viewpoints and considerations. The prevalence of existing attitudes and assumption either serves to keep alternative viewpoints and opinions off the deliberative agenda, or serves to weaken the capacity of alternative viewpoints and opinions to receive a fair hearing in processes of ongoing deliberation. Such a situation contributes to a process of *deliberative inertia*, as existing attitudes and assumptions tend to privilege existing agendas and policy priorities.¹⁰

¹⁰ Widely shared assumptions and attitudes in deliberative forums might result in more serious consequences than deliberative inertia. Cass Sunstein has discussed the implications for

James Bohman provides an extensive account of how deep-seated assumptions and attitudes can make democratic debate and institutions unreceptive to contestation and competing perspectives. This inertia undermines the capacity of democratic institutions to engage in innovation and change, particularly in response to new problem situations. According to Bohman, in order to facilitate innovation it is necessary to rely on a pool of social critics and social movements in civil society who challenge existing assumptions and seek to open up deliberative processes to new ideas and information. According to him 'critical discourse attempts to overcome blockages of and restrictions on communication, to let citizens see things in new ways, to help in the formation of new publics, and thus to overcome the restricted forms of institutionalisation and routinization typical of the state in its modern form' (Bohman, 1996: 203). The criticism advanced by these social critics has both horizontal and vertical dimensions. Social critics want to contest the prevalence of existing attitudes and assumptions on the part of political actors and policy makers, and therefore encourage the state to enter into dialogue about the need for a change in policy priorities or a change in attitudes or assumptions over specific policy areas. Social critics also want to stimulate deliberation throughout civil society, and build up awareness of

deliberative democracy of social scientific evidence into the dynamics of group deliberation. In situations where a deliberative group is comprised of persons who share similar points of view prior to deliberation, deliberation will tend to result in 'group polarisation'. Such polarisation pushes members of the group to endorse more extreme policies, based on their pre-deliberative preferences, than would ordinarily be the case. The reason is that deliberation cannot draw upon a range of competing viewpoints and considerations that might challenge the pre-deliberative preferences and beliefs of participants, thus restraining them from a wholehearted affirmation of those preferences and beliefs. According to Sunstein, this kind of polarisation emerges not because of the quality of the arguments expressed in deliberation, but because of social pressures and group dynamics that push similarly inclined participants to more extreme statements of commonly held views. In order to avoid the worst effects of group polarisation, Sunstein endorses institutional arrangements that extend available argument pools, and make it more likely that persons will be challenged to defend and justify their beliefs and preferences to others who may not share them (Sunstein, 2003; see below, footnote 12).

new problem situations and the need to formulate responses to these problems (Bohman, 1996: 217).

The presence of deep-seated attitudes and assumptions throughout a democratic community frustrates deliberative sensitivity to competing considerations in a number of areas. A recent example is the difficulty of achieving widespread recognition of the saliency of ecological considerations in trade and industry policy. Democratic deliberation over trade and industry policy has tended to prioritise certain aims over and above environmental or ecological concerns. For instance, the aims of maximising the potential for economic exploitation of natural resources and stimulating economic growth are powerful variables in political deliberation (Dryzek, 1997: 12; Low and Gleeson, 1998: 17-18). The widespread belief that economic considerations enjoy priority over these policy areas means that introducing competing consideration and information into deliberation is a challenging process.

In order to achieve widespread recognition that competing viewpoints and information are relevant to processes of deliberation, such as information about long-term effects of current policy priorities on stocks of natural resources or the health of eco-systems, it may be necessary to engage in attention seeking campaigns of contestation. A campaign of civil disobedience geared towards raising awareness of environmental or ecological issues aims to contest the attitudes and assumptions that inform the current policy priorities of political actors and communicate concerns to other citizens in civil society. Protest action

constitutes a means of mobilising public opinion against established assumptions and deliberative inertia.

Another example of how deep-seated assumptions and beliefs limit the range of information available for deliberation in political bodies is international finance and trade policy. Recent social critics have charged that the international organisations responsible for global trade and finance policy – the IMF, the World Bank and the WTO – are operating with a pre-determined economic agenda. Broadly speaking, the agenda is informed by a neo-liberal economic outlook that prioritises capital market liberalisation, reduced spending on welfare provisions, and privatisation of state industries and services (Stiglitz, 2002: 53; Scholte, 2000: 34-35). This agenda for deliberation operates within international organisations, and also throughout public deliberation over the direction of global trade and finance policy within national democratic communities. Recently social critics from a range of political backgrounds have contested the wisdom of the prevailing economic orthodoxy. In particular, political and economic crises within states that have adopted the policy proposals imposed on them by global institutions has provoked debate over whether or not the prevailing economic orthodoxy is efficacious or fair for developing countries (Stiglitz, 2002: 18).

In order to articulate opposition to economic orthodoxy, and create a potential space for alternative policy programmes, various social movements have engaged in a range of disparate protest activities against global economic

institutions (Young, 2003: 108-109). Protest activity is geared towards challenging assumptions and attitudes that frustrate the circulation of alternative viewpoints and information throughout processes of public deliberation. One of the aims of civil disobedience, and a component of its public justification in a constitutional democracy, would be to contest and challenge deliberative inertia and introduce alternative information and concerns into public deliberation.¹¹ The hope is to ensure that processes of deliberation will become more informed about various policy areas, and increase the chances that decisions reflect the widest possible range of relevant information and concerns.¹²

Civil disobedience as deliberative contestation places a high premium on the process of public justification protesters engage in when defending their actions to others. When citizens engage in protest in order to make processes of public deliberation more informed, along the lines demanded by the principle of

¹¹ Referring to recent protest action against global economic and financial institutions and the neo-liberal orthodoxy that informs their deliberations and decisions, Stiglitz claims: 'until the protesters came along there was little hope for change and no outlets for complaint...it is the trade unionists, students, environmentalists – ordinary citizens – marching in the streets of Prague, Seattle, Washington, and Genoa who have put the need for reform on the agenda of the developed world' (Stiglitz, 2002: 9). Anti-globalisation protesters constitute an example of how deliberative inertia – general acceptance of certain assumptions about the direction of policy and the agenda for deliberation – can be contested by principled acts of protest and civil disobedience. Protest serves the function of expanding the range of deliberative options by challenging prevalent ideas and introducing competing considerations.

¹² The tendency of deliberative groups to polarise (discussed above in footnote 10) adds another dimension to civil disobedience aimed at challenging existing assumptions that are widely shared throughout the deliberative community. Protesters could argue that without public challenges to these assumptions, deliberative decisions are likely to lead to 'polarised' results, whereby a store of widely shared pre-deliberative preferences and beliefs lead to more extreme decisions than would have been the case if those preferences and beliefs had been more effectively challenged in deliberation. This might especially be the case for deliberative bodies such as the WTO and IMF. These deliberative bodies are alleged to be problematic precisely because the participants tend to draw upon a broadly similar range of economic arguments when making decisions and drawing up policies. Groups engaged in criticising these deliberative bodies are, amongst other things, trying to broaden the range of information and opinions available for collective deliberation. In so doing they make polarisation – an extreme affirmation of widely shared pre-deliberative views – less likely.

informed deliberation, it is important that they explain to others why illegal protest is an especially justified means of raising and publicising their concerns. Whilst there may be other kinds of public justifications for civil disobedience geared towards enhancing the informational resources of deliberation, the account developed here suggests that the difficulty of breaking down and challenging widely held assumptions might form the basis of one such public justification. Protesters would justify their acts by referring to the difficulty of challenging views and practices that are widely held within deliberative bodies and throughout the democratic community. In order to set in motion deliberative innovation it may be necessary to go to great lengths in order to raise awareness and challenge existing assumptions. It is on these kinds of grounds that arguments in favour of potentially de-stabilising political protest should be based.

To summarise: The deliberative contestation theory gives a fairly robust account of the circumstances when civil disobedience becomes especially justified. When deliberation excludes governed parties or neglects the interests of affected parties, when it is manipulated or biased by powerful participants, and when it is insufficiently informed, citizens might legitimately claim that the binding power of decisions is weakened and engage in civil disobedience as deliberative contestation. References to political frustrations of deliberative principles should figure in public justifications of civil disobedience in constitutional democracies. When protesters publicly declare their reasonable belief that actual deliberation has frustrated deliberative principles, they provide a political justification of their

actions to other citizens. This means that protesters have cited reasons that other citizens, similarly committed to deliberative politics, can accept as valid. It also means that protesters have explained why they feel morally entitled to engage in extra-institutional activity against deliberative inadequacies. They cite failures within existing deliberative procedures as evidence that their binding power is weak, and that existing institutional measures to contest these failures may be less efficacious than direct action such as civil disobedience.

III. Public reason as a constraint on civil disobedience

Deliberative contestation suggests that an act of civil disobedience can be justified when citizens reasonably believe that deliberative principles have been violated. Deliberation can be contested through civil disobedience when it is insufficiently inclusive, prone to bias or manipulation by powerful participants or insufficiently informed of relevant considerations and concerns. In this section I want to explore the implications of *public reason* for the account of justified civil disobedience sketched above. In particular, I want to enquire whether public reason might restrict citizens from advancing certain policy proposals or ideas through civil disobedience.

I mentioned in section 1 of this chapter that some accounts of deliberative democracy elaborate a conception of public reason in order to specify how citizens should deliberate with one another over certain political problems. Public reason tries to show how citizens who disagree profoundly with one

another over fundamental issues can still deliberate about the direction of policy, and why all citizens should accept deliberative outcomes as legitimate. A popular model of public reason requires that when citizens are debating important political issues they should abstain from advancing arguments drawn from their own *comprehensive* doctrine of ethics or morals (Rawls, 1999a: 135-137; Cohen, 1997b: 414; Larmore, 2003: 384-390; Dreben, 2003: 337-339). Such abstinence is necessary to ensure continued dialogue with others who do not share that doctrine; in particular, it is necessary in a condition of *reasonable pluralism*, which is marked by a proliferation of competing comprehensive doctrines throughout society. Instead of appealing to considerations drawn from comprehensive doctrines, citizens should deliberate on the basis of a family of shared political principles and ideas (Rawls, 1999: 140). I do not want to challenge this general account of public reason here.¹³ Instead I want to enquire whether it should impact upon the deliberative theory of civil disobedience developed above.¹⁴

The first point to make is that, in an important sense, the theory of civil disobedience developed so far *does* draw upon ideas similar to those associated with public reason. In particular, the theory states that when justifying civil disobedience, citizens should not appeal to their own moral, ethical or religious

¹³ There is a large literature on deliberative democracy that criticises models of public reason that prohibit considerations drawn from comprehensive conceptions. See Gutmann and Thompson (1996) 78; Gutmann (2003) 192-197; Habermas (1996) 314; Dryzek (2000) 45; Young (2000) 24; Bohman (1996) 89; Sandel (1998) 210-218; Benhabib (2002) 109; Mouffe (2000) 22-31.

¹⁴ Joshua Cohen suggests that public reason is the core feature of deliberative democracy, which sets it apart from other conceptions of democracy (Cohen, 1997b: 413). It therefore seems reasonable that any theory describing itself as 'deliberative' should at least engage with the idea of public reason.

beliefs or preferences. Instead they should appeal to public political principles that are widely recognised throughout the democratic community. Civilly disobedient citizens should appeal to public political principles that are widely accepted as legitimising the exercise of political power in constitutional democracies. When civilly disobedient citizens appeal to these principles, they explain to other citizens why they feel that their grievance gives them a justification to disobey the law. They state their reasonable and sincere belief that the normal moral reasons we have for complying with law (that it respects rights and is made in a sufficiently deliberative manner) do not apply, or apply with less force than they otherwise would. Citing these principles, rather than referring to one's own private conscience or beliefs, means that civilly disobedient citizens are offering justifications for their actions that other citizens of a constitutional democracy can accept as reasonable.

The second point to make is that there is an important sense in which civil disobedience as deliberative contestation has so far *neglected* the concerns of public reason. In order to see why this is so, one has to reflect on the dynamics at work in many acts of civil disobedience. In particular, one has to recognise the various different opinions and beliefs that protesters will be introducing as inputs into ongoing public deliberation. One of the in-puts that citizens offer is their justification of civil disobedience, which will involve an appeal to public political principles. But it will not always be the case that this is the *only* opinion or belief that civilly disobedient citizens introduce as an in-input to ongoing deliberation. As well as offering a justification for civil disobedience, citizens

might also use the protest as a means of publicising their general beliefs about the direction of government law and policy. For instance, a civilly disobedient citizen protesting biased or ill-informed deliberation will, through his or her protest, also typically be advancing his or her opinions about a particular policy area. Protesters may seek to publicise views and opinions that they believe are not receiving a fair hearing in public deliberation, because powerful actors or entrenched assumptions are conspiring against their arguments. The views and opinions that protesters publicise through civil disobedience might draw upon comprehensive doctrines, and hence be morally problematic according to public reason.

A recent civil disobedience campaign illustrates this point. In the U.K. and the U.S.A. the protest network 'Reclaim the Streets' has engaged in an original campaign of direct action, frequently involving acts of civil disobedience such as illegal street parties or occupations (Duncombe, 2002; Klein, 2000: 311-322). The agenda of the movement is diverse, and frequently involves a critique of policies and attitudes relating to road and urban developments. Their campaign of civil disobedience may be justifiable through appeal to deliberative principles. In particular, Reclaim the Streets activists claim that they are stimulating public debate and deliberation, by seeking to challenge deeply held assumptions about car use and public space that allegedly inform policy formation and frustrate the circulation of alternative but potentially relevant considerations. Despite this deliberative justification of civil disobedience, Reclaim the Streets might be accused of violating public reason. This is because their agenda appears to be

informed by ideas drawn from comprehensive doctrines that are unlikely to be widely held in a diverse society marked by conflicts over the good. In particular, Reclaim the Street favour fostering more public spaces for a wide range of communal activities, and limiting the availability of private space for car use or commercial activity (Wood and Moore, 2002: 31-32). In this sense, even an act of civil disobedience that appears to be justifiable might be criticised as unreasonable. This raises the question: should civil disobedience as deliberative contestation add, as a further condition of justified civil disobedience, that citizens do not advance any claims derived from comprehensive doctrines when engaged in public protest?

In response, I suggest that civilly disobedient citizens should not be completely prohibited from referring to ideas drawn from comprehensive doctrines, but that citizens should not advance ideas from comprehensive doctrines that would, if translated into public policy, result in serious violations of basic rights or deliberative principles. I defend each of these positions in turn.

The reason why deliberative contestation should allow civilly disobedient citizens to invoke considerations drawn from comprehensive doctrines is that such permission may prove valuable to enhancing informed and inclusive processes of ongoing deliberation. To stay with the example of Reclaim the Streets, even though some of their ideas about the use of public space might appear extraordinary to some, the value of their protest lies in contesting widely held ideas and assumptions. By engaging in imaginative acts of protests Reclaim

the Streets succeed in transmitting a variety of messages to the wider democratic community. By holding an illegal street party, activists disrupt ordinary expectations about the use of public spaces. By presenting us with an alternative vision of how public space might be used, a vision that would perhaps allow greater scope for communal activities, activists encourage the wider community to reflect on their own ideas and about the assumptions that generally inform public policy over urban planning. In this instance, invoking ideas drawn from a comprehensive doctrine can play a positive role in enhancing deliberation.

Arguably, similar stories could be told about civil disobedience that invokes considerations from comprehensive ethical views about the environment or animal welfare (Singer, 1973: 90). Whilst these views are no doubt controversial, especially in conditions of reasonable pluralism, there may be some value in allowing justified civil disobedience to promote these conceptions. The value of these protests is that they highlight and contest entrenched assumptions about the relationship between persons and the natural world, and the way that these assumptions inform public policy. The hope is that these challenges will stimulate and provoke public deliberation across society that will illuminate our assumptions and make them subject to examination and criticism.¹⁵

¹⁵ I suspect that most theorists of public reason would be fairly comfortable with this position. Several theorists emphasise that the prohibition on invoking comprehensive doctrines applies primarily to legal and political actors with lawmaking power and only when they deliberate over 'fundamental' political issues (Rawls, 1999: 133-134).

In contrast to civil disobedience that draws upon comprehensive doctrines in a constructive manner that should enhance public deliberation, some acts of civil disobedience might invoke such doctrines in an unacceptable fashion. A racist political organisation, for instance, might engage in civil disobedience to protest its formal or informal exclusion from deliberative arenas and to publicise its agenda.¹⁶ Such a group would be promoting an agenda that is actively *hostile* to public political principles. For example, it may endorse a doctrine of ethnic nationalism that, if politically implemented, would favour one ethnic group in the community over another (Habermas, 1998: 130; Ignatieff, 1993: 3-6). Civil disobedience carried out by groups actively hostile to public political principles is unlikely to enhance public deliberation and is likely to undermine the political and social basis of deliberative democracy. It is difficult to sustain the impression of a community within which people respect one another as equals and engage in public reason giving to decide law and policy, in the context of certain ethnic groups being signalled out for unfair treatment. Therefore, according to the deliberative contestation account, these acts of civil disobedience will not be justified.

The sense in which civil disobedience as deliberative contestation does not tolerate 'hostile' groups is similar to the tendency for deliberative democrats to

¹⁶ A racist political party might complain if its members believe that they are not enjoying advantages available to other political parties, or that bias within the mass media is conspiring against them. This dilemma is discussed by Michael Randle: 'The problem about granting civil disobedience a recognised place within the democratic process is that if one group can take advantage of it so can another – racist and extreme right wing groups, for instance, who have no commitment to democracy either in so far as it implies respect for fundamental human rights, or for majority rule.' (Randle, 1994: 192).

prohibit certain forms of argument or politics as 'unreasonable'. Joshua Cohen claims that arguments which treat some citizens as being of unequal worth, for instance by frustrating their capacity to pursue their own conception of the good, are inconsistent with the fundamental principles of deliberative democracy and hence not a proper part of public deliberation (Cohen, 1997b: 421). Amy Gutmann says that even though arguments from comprehensive doctrines might play a constructive role in public deliberation, this tolerance can not extend to any argument that supports violations of basic liberties (Gutmann, 2003: 193-194). Like general theories of deliberative democracy, civil disobedience as deliberative contestation can insist that all citizens, including those who engage in civil disobedience, accept its underlying political principles.¹⁷

In summary: In this section I have illustrated how debates over public reason apply to a deliberative theory of civil disobedience. The problem presents itself because as well as offering justifications for an act of civil disobedience, protesters also typically offer ideas and opinions about the direction of law and public policy. I suggested that protesters should not be prohibited from referring to arguments from comprehensive moral or ethical doctrines during the course of

¹⁷ It should be acknowledged that difficult cases could blur the distinction between drawing upon a comprehensive doctrine in a constructive way, and drawing upon a comprehensive doctrine in an unacceptable way. For instance, a group might engage in civil disobedience to campaign against a practice that they and many others find morally abhorrent (because of considerations drawn from comprehensive doctrines) but which those who engage in the practice believe they have a moral or legal right to perform. I suspect that the only plausible way of ascertaining the appropriateness of civil disobedience in such a case would be a context-specific judgement that engages with the full range of relevant issues (e.g. the amount of informed and inclusive deliberation already devoted to the practice, the plausibility of arguments defending the practice as a right, the conduct of any act of civil disobedience).

their protest, but that protesters should be prohibited from advancing arguments that undermine fundamental political principles of rights and democracy.

Conclusion: The role of civil disobedience in a deliberative republic

In this chapter I have tried to sketch a theory of civil disobedience that constructs justifications for this kind of illegal protest activity by using principles gleaned from a deliberative model of democracy. In conclusion I want to say a few words about how civil disobedience as deliberative contestation might fit into a broader account of deliberative democracy.

One of the reasons why discussions of dissent and disobedience have not figured prominently in the vast literature on deliberative democracy is that deliberative democracy is often presented as an institutional arrangement to ameliorate and contain disagreement (Gutmann and Thompson, 1996 and Rawls, 1999a). The idea is to show how persons can assent to democratic decisions even if they disagree with the decisions made, and therefore it is perhaps surprising that this chapter has insisted that deliberative democracy might be capable of furnishing a theory of civil disobedience. Without claiming that all deliberative democrats would be sympathetic to the ideas pursued here, I would stress that the kind of circumstances where deliberative contestation justifies civil disobedience are those where citizens can reasonably claim that the rules of the deliberative game are not being adhered to. The idea that deliberative decisions should be binding only holds given sufficient institutional realisation of deliberative principles: in

particular debate and decisions must not exclude those governed or neglect the interests of those affected, nor must it be unduly affected by existing power inequalities, and nor should it be unreceptive to issues and concerns that may be circulating amongst the wider citizenry and that impact on how informed deliberation and decisions are. It is harder to convince people to accept the outcome of deliberative decisions if any or all of these conditions are not met.

Supposing that the kind of imperfections in actually existing deliberative procedures will be difficult to avoid, civil disobedience as deliberative contestation can play a vital role in counter-acting deliberative inadequacies and setting actually existing deliberation back on track. In this sense civil disobedience as deliberative contestation again resembles Rawls' theory, in that for Rawls also, civil disobedience can play a role in ensuring that a constitutional regime continues to adhere to the fundamental principles that lend its decisions and procedures legitimacy (Rawls, 1972: pp. 383-384). In particular civil disobedience as deliberative contestation contributes to the realisation of deliberative principles by: making deliberation more inclusive, through providing a means for marginalized persons to articulate their concerns; by making deliberation more informed, through providing a means for citizens to publicise information and concerns that are being neglected in public deliberation; and finally, by making deliberation more transparent, by providing a means for groups to contest inequalities that allow certain groups to exercise disproportionate influence over ongoing deliberation. All three enable us to see how a predisposition to engage in civil disobedience as deliberative contestation

ensures that actually existing deliberative practices remain firmly anchored to the principles of a healthy deliberative republic.

Coda: A provisional summary

At this point I want to offer a provisional summary of the theory of civil disobedience that has been developed throughout this essay. The essay has argued that justifications for civil disobedience can be made in the following three circumstances: (i) when laws and policies seriously violate basic liberties, (ii) when citizens want to extend the existing system of basic liberties or rights in the light of new problems and concerns, and (iii) when law making processes fail to respect principles of democratic deliberation.

Generally speaking, the theory tries to take into account two moral/political principles that can be cited as reasons for general compliance with law in a constitutional democracy. First: law is often said to be morally binding on citizens because it is sufficiently just, in particular if it respects the basic rights of democratic citizens. Second: law is often said to be morally binding on citizens because it is created democratically, which is interpreted as meaning that citizens are given opportunities to be involved in law making processes. The circumstances where civil disobedience might become justifiable are circumstances where these reasons do not apply, or apply with less force than they otherwise would. When civil disobedience is carried out in these circumstances, protesters appeal to public political principles that are generally

acknowledged to set the fair terms of social co-operation in the democratic community. Insofar as justice and democracy represent moral reasons for complying with laws, unjust laws and undemocratic procedures undercut the reasons for compliance. Citizens who reasonably believe that laws and policies violate basic rights, or fail to respect new rights, or are made in an insufficiently deliberative fashion, are claiming that in their considered opinion the fair terms of social co-operation are not being respected.

In this chapter, the democratic justification of civil disobedience was discussed and characterised as 'deliberative contestation'. The name signified the fact that civil disobedience is geared towards contributing to ongoing *deliberation* in the public realm, and constitutes a *challenge* to perceived failings on the part of actual deliberation. I propose, for simplicity, to extend the term 'civil disobedience as deliberative contestation' so that it describes the theory as a *whole*: which means that it refers to all the three political justifications of civil disobedience discussed above.

So far, the argument has proceeded by drawing upon ideas found in contemporary political theory. Arguments about rights and democratic procedures have been utilised to construct a working theory of civil disobedience. In the final chapter, the theory is assessed in the light of a prominent campaign of civil disobedience carried out in the U.S. One aim of this is to show that civil disobedience as deliberative contestation offers plausible normative prescriptions, and is relevant to real world discussions and problems.

Another aim is to try and use discussions surrounding actual protest campaigns as a potential resource for augmenting and developing the theory developed so far. Discussions of actual protest campaigns might reveal ideas that are so far unacknowledged by civil disobedience as deliberative contestation, but which seem significant for developing a full picture of justified civil disobedience in a constitutional democracy.

Chapter 5: Deliberative Contestation and the Civil Rights Movement

In the previous chapters the theoretical literature on civil disobedience was examined in order to generate a normative theory of civil disobedience applicable to constitutional democracies. In the last chapter a deliberative contestation theory of civil disobedience was developed, which employs the normative principles associated with a robust constitutional democracy as a resource for constructing justifications of civil disobedience. In this final chapter the focus shifts from a purely theoretical treatment of civil disobedience towards a more practically orientated approach. It compares and contrasts the justification of civil disobedience recommended by deliberative contestation, with the justification of civil disobedience advanced by the civil rights movement.

Why shift from an investigation into the political theory of civil disobedience to an investigation into an historical example of civil disobedience? There are two reasons for making this transition. The first reason is to head off complaints that a philosophical approach to civil disobedience might buy theoretical clarity at the expense of practical relevance.¹ If a theory of civil disobedience makes claims about justification that are wholly detached from what we can reasonably expect of citizens who have engaged or might engage in political disobedience, or indeed the democratic community to whom the disobedience is addressed, then

¹ David Lyons (1998) complains that theories of civil disobedience too often ignore what he calls the 'historical reality' of civil disobedience. One of the consequences is that these theories end up advocating positions that bear little resemblance to those of well known and generally well respected practitioners of civil disobedience (e.g. Martin Luther King, Thoreau; see footnote 2).

this might constitute a problem for the plausibility of the theory. The theory will be more relevant to real-world political contexts if there is some overlap between theoretical recommendations and political reality. The second reason is to illustrate that a theory like the one developed here can be receptive to concerns and ideas advanced in the public spheres of real-world constitutional democracies. A theory of civil disobedience might have much to learn from arguments that have been advanced during the course of actual protest campaigns. Protesters themselves advance justifications of civil disobedience that challenge our theoretical assumptions, and which call for some kind of theoretical response. In short, exploring actual protest campaigns is a good way of both consolidating a normative theory and possibly reforming and developing it in the light of new ideas or concerns. In the first section of this chapter I say a little more about the reasons for exploring actual cases of civil disobedience.

In the second and third sections I compare civil disobedience as deliberative contestation with the justification of civil disobedience offered by Martin Luther King in his well-known 'Letter from Birmingham City Jail'. In the second section, I use the example of the civil rights movement to investigate the plausibility of deliberative contestation. I show that King invokes many of the ideas defended by deliberative contestation, including rights, democracy and deliberation. This comparison is useful because it shows that civil disobedience as deliberative contestation resonates with a popular and influential protest campaign, and that its focus on public political principles is not as far removed from the practice of civil disobedience as we might expect or fear. This finding

consolidates the theory advanced in previous chapters, by showing that it is not too unrealistic in its assumptions about the way in which citizens might advance justifications for civil disobedience within actual constitutional democracies.

In the third section, I use the example of the civil rights movement to investigate whether or not deliberative contestation can and should be receptive to ideas and concerns raised by King in his letter. In particular, King's letter yields two ideas about justified civil disobedience that have been neglected by the deliberative contestation account. One idea is that civil disobedience does not take place in a political vacuum, but against a rich constellation of social, political, cultural and historical variables. In the case of the civil rights movement, the relevant context was one of endemic racism throughout American society, reflected in the historical exclusion of the black population from full citizenship. Another idea is that the conduct or manner of the protest impacts upon the moral worth or standing of the act. Non-violence may be part of what contributes to the morality and justification of civil disobedience, but wider considerations about the manner of the protest and the way it treats its audience might also come into play. It is suggested that King's references to the significance of context and conduct carry powerful weight, and should therefore be incorporated (at least in some form) into the deliberative contestation account. This section, then, attempts to reform and develop the theory in the light of relevant ideas advanced by Martin Luther King.

I. Why look at actual cases of civil disobedience?

In this section I want to explain and defend the decision to compare and contrast the normative theory of civil disobedience with a prominent historical campaign of civil disobedience. As stated in the introduction, the two reasons behind this decision are to consolidate the theory, by illustrating the plausibility of its normative prescriptions, and to develop the theory, by responding to ideas about civil disobedience advanced by actors within the public spheres of actual constitutional democracies. In this section I examine each reason in turn.

The first reason to explore an actual case of civil disobedience is to test the plausibility of a theory of civil disobedience. By 'plausibility of the theory' I mean the following: does the deliberative contestation account recommend justifications of civil disobedience that are likely to be (i) employed by citizens who are motivated enough to engage in civil disobedience within constitutional democracies and (ii) accepted as reasonable by other members of the democratic community? These dimensions of plausibility apply respectively to the actors engaged in civil disobedience and the actors observing or judging the campaign of civil disobedience.²

Exploring the plausibility of the theory is important in order to ascertain its potential application to real world conditions. Consider the first component of plausibility, which relates to the justifications offered by civilly disobedient

² For a comparable use of the term 'plausible' in a similar context, see John Rawls' theory of civil disobedience at (1972) 386.

citizens in actual constitutional democracies. It may seem an objection to a theory of civil disobedience if it says that protesters should employ strategies of justification that bear little resemblance to strategies that have historically been employed by prominent practitioners of civil disobedience. A critic might say that 'it is all very well in theory to claim that protesters should appeal to public political principles in justifying civil disobedience, but in practice protesters have tended to cite other reasons for engaging in this kind of protest.'³ The critic might go on to conclude that the theory is therefore not relevant to actual conditions, and that it sets standards of justification that actual protesters are unlikely to meet.

Alternatively, consider the second component of plausibility, which relates to the response of the wider democratic community to a campaign of civil disobedience. It might seem an objection to a theory of civil disobedience if it says that democratic communities should regard rights-based or democracy-based civil disobedience as justified when actual democratic communities tend to be hostile to such campaigns. A critic might say that 'it is all very well in theory to defend civil disobedience as a component of a healthy deliberative democracy, but in practice protesters tend to be viewed as a nuisance and are typically ignored or treated with hostility by the democratic community'. Again, the critic might conclude that the theory is therefore not relevant to real world conditions,

³ Compare Lyons: 'when theorists regard as civil disobedience only acts of individuals who accept the prevailing system...they impute such an outlook to paradigm practitioners of civil disobedience, such as Henry David Thoreau, Mohandas K. Gandhi, and Martin Luther King, Jr. The result is a *false picture of historically significant resistance*.' (my italics, Lyons, 1998: 32-33). I am interested not so much in the content of Lyons' criticism but with its form, which criticises the historical naivety of theorists.

or that the theory is too utopian in its depiction of civil disobedience as a sometimes necessary and defensible component of democratic politics. On both counts, the critic would claim that the application of the theory to real world conditions is severely limited because of its implausible prescriptions.

It is important to note that these kinds of objections do not necessarily constitute *moral* criticisms of the theory. The critic need not claim that a theory's normative recommendations are somehow refuted or falsified by a factual state of affairs. Rather, the objections imply that the theory is toothless in the real world, and that it has little relevance for actual discussions about civil disobedience in constitutional democracies. In response to these objections, the theorist can either ignore them, on the basis that his or her theory can stand without the consolidation of offering a plausible set of proposals, or respond to them by arguing that the theory does offer plausible normative prescriptions. He or she might do this by comparing the theory favourably with some prominent examples of civil disobedience. He or she would hope to show that we have *some* reasonable grounds for believing that the theory offers a plausible account of the reasons civilly disobedient citizens should cite for their protest and a realistic picture of how the wider democratic community might respond to such political protest. One can make a comparison here with the way in which John Rawls tries to illustrate his theory of public reason by describing what he believes to be some historical examples of public reason in action (Rawls, 1999a: 164-168). Such examples enable Rawls to offer his readers some sense of what political debates carried through public reason would look like, and to

demonstrate that public reason does not offer an unrealistic account of democratic deliberation. In the next section I compare civil disobedience as deliberative contestation with Martin Luther King's defence of the civil disobedience campaign against segregation laws.

The second reason to explore actual cases of civil disobedience is to investigate the potential for revising the theory in the light of relevant ideas about civil disobedience expressed by actors within the public spheres of constitutional democracies. I understand 'public sphere' here in a fairly general sense, as the various forums within which a political community engages in debate about issues of shared concern and interest.⁴ Such forums might be found in public political and legal institutions (such as parliaments and courts) or in more informal public arenas (such as universities, associations in civil society, or spaces created and controlled by the mass media).

Citizens who engage in civil disobedience typically attempt to enter the public sphere by using protest as a means of communicating concerns to other citizens, either directly via their own means of communication or indirectly via the mass media. By offering justifications for their actions, civilly disobedient citizens also contribute to debates about the nature, role and justification of civil disobedience within constitutional democracies. An interesting feature of public debate promoted by political protest is often its dual nature: on the one hand

⁴ For similar but more comprehensive definitions of the public sphere, see Habermas (1996) 360-366 and Young (2000) 168-173.

debate focuses around the laws, policies or concerns that are the focus of the protest (for instance, segregation, abortion, war, the environment); on the other hand debate focuses around the means which protesters use to raise their concerns (for instance, the morality of law-breaking, the manner or conduct of protesters, the efficacy of protest).

A political theorist exploring the issue of civil disobedience has good reason not to be insensitive to public debates provoked by actual cases of civil disobedience. Such debates can often reveal novel considerations about the nature, role and justification of civil disobedience within a constitutional democracy. For instance, a prominent campaign of civil disobedience might challenge existing assumptions about civil disobedience held by political theorists. In the first chapter, I described how campaigns carried out by new social movements over a range of issues and concerns challenged the justification of civil disobedience suggested by liberal theorists such as Rawls. Rawls and other liberal writers have offered strong defences of civil disobedience carried out in response to serious injustices, such as laws that violate basic liberties. However, civil disobedience carried out by new social movements often was not and could not be defended on those terms (see above, p.73). The actions of these groups offers an explicit challenge to liberal theories of civil disobedience: should political theorists retain their original commitments, and claim that non-justice based civil disobedience is not justifiable, or should political theorists revise their theories in the light of potentially reasonable arguments about the value of non-justice based civil disobedience? Either way, the arguments of protesters in the public sphere

require some kind of consideration and response on the part of political theorists, particularly when these arguments challenge our existing theoretical ideas.

Two quick qualifications to what has just been said should be noted. First, the mere fact that protesters advance ideas about civil disobedience in the public sphere does not mean that theorists are bound to accept them. These ideas should be treated with respect, but also with criticism and judgement. Second, investigating ideas about political protest advanced in the public sphere is not, of course, the only way in which existing theories might be revised or defended. More traditional theoretical reflection can offer many interesting challenges to theories of civil disobedience. These qualifications do not make examination of actual cases of civil disobedience redundant in theoretical reflection. Justifications of civil disobedience advanced by citizens in the public sphere offer an invaluable resource for theorists in revising, developing or defending their theories. In the final section of this chapter I illustrate this claim by showing how civil disobedience as deliberative contestation can incorporate valuable insights advanced by Martin Luther King about the conduct and context of a civil disobedience campaign.

In summary: Illustrating the plausibility of the theory's recommendations, and developing the theory in the light of relevant considerations advanced by protesters, constitute two reasons to explore actual cases of civil disobedience. It should be noted that though the two reasons are independent (i.e. you could accept one without the other), they might often go hand-in-glove. For instance,

one could illustrate the plausibility of an existing theory by looking at arguments offered by civilly disobedient citizens in the public sphere. If practitioners raise issues and concerns that our theory has so far neglected, then it might make our theory seem more plausible if these concerns could be incorporated in some way. For the sake of ease in presentation the rest of this chapter treats each reason separately. The next section explores the plausibility of the theory in the light of the civil rights movement's campaign, and the final section seeks to develop the theory in the light of relevant concerns and ideas advanced by Martin Luther King.

II. Deliberative contestation and the Civil Rights Movement (1): The plausibility of the theory

In this section I explore the plausibility of civil disobedience as deliberative contestation, by investigating: (1) whether or not its recommendations about how civil disobedience should be justified cohere with the justifications offered by actors involved in the protest campaign carried out by the civil rights movement, and (2) whether or not its recommendation that the wider democratic community should accept such protest as justified was born out in the response of other American citizens to the campaign. I conclude that this investigation does consolidate the theory, with some qualifications, by showing it to resonate with a prominent campaign carried out in recent times.

(1) In order to carry out a focused comparison between deliberative contestation and the civil rights movement, I examine Martin Luther King's 'Letter from Birmingham City Jail'. King composed 'Letter from Birmingham City Jail' in his prison cell, after being arrested for violating a court order prohibiting a civil rights demonstration in Birmingham, Alabama (Carter, 1998: 106). The immediate purpose of the letter was to defend the civil rights movement and its use of civil disobedience against criticism from religious leaders. Over time it has come to be seen as one of the 'most influential sources for discussion of the whole topic' of civil disobedience (Bedau, 1991: 4). John Rawls claims that his own theory of civil disobedience is similar to the one presented by King in 'Letter from Birmingham City Jail' (Rawls, 1972: 364ff). King's belief in the injustice of segregation and the justice of disobeying laws in order to oppose it,⁵ dovetails with Rawls' own view that only 'clear and substantial injustices' can suffice to illegal political protest. It also overlaps with the kind of reasons that the deliberative contestation theory recommends as potential grounds for justified civil disobedience. In fact, King's arguments appeal to rights based concerns, democratic concerns and the idea of stimulating widespread and public deliberation throughout American society.

The main reason King cites for criticising segregation and embarking on a campaign of civil disobedience is that segregation constitutes an unjust violation

⁵ As shall be touched on, the civil rights movement engaged in a range of protest tactics, including indirect civil disobedience, and constitutional testing of allegedly invalid state statutes (Carter, 1998: 107-108). The use of indirect civil disobedience tactics means that the civil rights movement can be seen as a genuine campaign of civil disobedience, even if it also engaged in more lawful forms of disobedience.

of the rights of black citizens to be afforded equal treatment before the law. According to King: 'all segregation statutes are unjust because segregation distorts the soul and damages the personality...it gives the segregator a false sense of superiority, and the segregated a false sense of inferiority.' (King, 1991: 73) King claims that unjust laws are less deserving of obedience and respect than just laws. He seeks to ascertain that segregation is unjust, then appeals to the tradition of natural law and the writings of Aquinas to argue that such unjust laws are less deserving of respect and obedience than just laws (King, 1991: 73).

Whilst King's arguments about rights and under-developed, he appeals to well established and plausible intuitions that segregating public facilities along racial lines offends equality. The reason it offends equality is not necessarily because black citizens enjoy worse or less public facilities, but because the idea that they must receive those facilities and services separately from whites denigrates their equal status. It suggests that whites reserve the right to be separate from others purely on the grounds of skin-colour, implying, in King's terminology, that they regard themselves as 'superior' to blacks. In fact, this opposition to segregation is reminiscent of Dworkin's discussion of segregation in *Law's Empire*, where the injustice of segregation lies in its appeal to or dependence on racist preferences on the part of those who supported it (Dworkin, 1986: 381-389). This violates the rights of blacks not to have public policy relating to their possession of resources like education or public transport be influenced by the malicious preferences of others. The deliberative contestation theory would see

this as a reasonable belief about rights, which would be a good *prima facie* reason for engaging in civil disobedience.

Another argument King invokes against segregation is that segregation statutes are often drawn up in states that, through a variety of means, do not provide black citizens with an opportunity to vote in elections. According to King, 'an unjust law is a code inflicted upon a minority which that minority had no part in enacting or creating because they did not have the unhampered right to vote.' (King, 1991: 74) These laws are less deserving of obedience because not everyone was allowed an equal say in the creation of these laws. Once again the deliberative contestation theory would endorse this as grounds for civil disobedience. It is a crucial part of the deliberative theory of democracy described in the last chapter that all citizens be seen as free and equal participants in ongoing processes of deliberation and (via elected representatives) law-making. In so far as black citizens are prevented from voting or participating in public discussion, they suffer exclusion from deliberative arenas. According to the deliberative contestation account, democratic exclusion constitutes reasonable grounds for engaging in civil disobedience.

Finally, King appeals to the idea that civil disobedience can be an effective means of contributing to ongoing democratic deliberation. According to King: 'nonviolent direct action seeks to create...a crisis and establish such creative tension that a community that has consistently refused to negotiate is forced to confront the issue...it seeks to dramatise the issue [so] that it can no longer be

ignored' (King, 1991: 71). For King, civil disobedience played a preliminary role in establishing the conditions for negotiation and dialogue between the black community and state actors in Southern America. He says: 'too long has our beloved Southland been bogged down in the tragic attempt to live in monologue rather than dialogue' (King, 1991: 71). This suggests that the civil rights movement's campaign coheres with the spirit of deliberative contestation, with its emphasis on ongoing public discussion and debate over issues of shared concern within democratic communities.

King's justification for disobeying civil disobedience broadly follows most theoretical justifications of civil disobedience. He explicates the reasons that he and his associates have for deeming particular laws to be criticisable or unacceptable, and offers an account of why these reasons constitute good ones for disobeying the law. Just as in the democratic contestation account, specific laws are criticised for failing to live up to the political principles that lend law its claim to moral legitimacy within constitutional democracies. The reason why protesters are justified in breaking laws is that those laws (or those laws that are the specific target of the protest) undermine the moral reasons we have for obeying law in the first place. I conclude that the deliberative contestation account captures the reasons King gives for engaging in civil disobedience.

This helps us to answer the charge that civil disobedience as deliberative contestation does not offer a plausible set of normative prescriptions. The justifications for civil disobedience that the deliberative contestation account

recommends are shown to resonate with one of the most prominent and influential practitioners of civil disobedience in recent times. The ideas that civil disobedience is a justified means for groups to contest exclusion, or a means to protest violations of rights, are not merely theoretical conclusions, but ideas which overlap with the rhetoric of at least some civilly disobedient citizens. In this way, the theory appears to have something to say to those who may engage or have engaged in it. Its recommendations are plausible in that they are likely to be taken up by those who engage in protest.

(2) The first comparison between deliberative contestation and the civil rights movement focused on the strategy of justification offered by civilly disobedient citizens. By showing that a prominent campaign of civil disobedience was couched, at least in part, through appealing to public political principles, deliberative contestation should appear less implausible in its prescriptions. The second comparison focuses on the response of the wider democratic community to the protest campaign. Is deliberative contestation unrealistic in its claim that civil disobedience can play a legitimate role in ongoing democratic deliberation? In particular, given historical precedent, is it unrealistic to expect the wider democratic community to regard campaigns of civil disobedience as politically justified? The example of the civil rights movement offers both discouraging and encouraging signs for civil disobedience as deliberative contestation.

On the one hand, there can be no denying that the experience of the civil rights movement revealed the difficulty faced by civilly disobedient protesters in

constitutional democracies. There was widespread opposition to both the agenda of the civil rights movement and (more importantly for my concerns here) to the means of protest they employed to pursue them. Often this opposition was reflected in brutal acts of violence (committed by state actors and non-state actors) against protesters. King describes some of these violent reactions in his Letter, along with the hostility and criticism that the civil rights movement received from religious leaders (King, 1991: 69, 79, 82; also Marable, 1991: 70-71; Lyons, 1998: 47; Carter, 1998: 83-84).

Opposition to the tactic of civil disobedience was also evident in the stated opinions of some of the civil rights movement's professed supporters. In a 1965 address to the Association of the Bar of New York City, the lawyer Louis Waldman professed himself to be a life-long advocate of civil rights for the black population, whilst condemning in the strongest terms the use of civil disobedience by the civil rights movement. His opposition was based on familiar arguments about the need to uphold law and order, and a denial of the claim (which he ascribes to Martin Luther King) that citizens should use their own considered convictions as a guide to deciding whether or not to obey the law (Waldman, 1969). Similarly, in an essay originally published in 1969, Herbert Storing criticised what he saw as the movement's preference for civil disobedience over allegedly more effective and less morally problematic forms of campaigning (Storing, 1991). Other supporters of the civil rights movement emphasised the distinction noted in previous chapters between civil disobedience and the constitutional testing of particular laws. According to these writers

(often lawyers), much of the protest carried out by the civil rights movement should be understood as the latter kind of activity (Tweed *et al.*, 1969; Taylor, 1969). In this way, these writers felt they could defend and celebrate *some* of the actions of the civil rights movement (that which took the form of constitutional testing) but not those actions that were not amenable to this kind of legalistic justification (civil disobedience). According to Tweed, Segal and Packer: 'when valid laws are broken simply to create sympathy for the civil rights position or, even less defensibly, simply to dramatise the contentions of the demonstrators, it seems clear that important values are being unjustifiably sacrificed' (Tweed, *et al.* 1969: 96). So, even some of those sympathetic to the civil rights movement were uneasy with the idea that civil disobedience campaigns were a justified course of action to take.

On the other hand, the civil rights movement was not universally condemned for their activities. The protest campaign certainly helped the black community to organise themselves around a common cause, and provided incentive for much needed political, legal and social change (Marable, 1991: 61-62). Moreover, the civil rights movement undoubtedly provided inspiration for political and legal theorists (such as Rawls, Dworkin and others) to study the phenomenon of civil disobedience, and to sketch political justifications of this kind of illegal protest.

Of more significance is the gradual acceptance of the civil rights campaign as a celebrated and necessary phase in recent American history. Whilst it is difficult to separate out respect for what the movement achieved from attitudes towards

the ways in which the movement pursued its goals, it is reasonable to contend that the civil rights movement succeeded in changing the legal-political terms of debate around the race issue in America to the point where their civil disobedience campaign has generally come to be seen as justified. In a recent essay, David Lyons appears to suggest that with the passing of time and over twenty years of political and theoretical reflection, it is now easier for many Americans to recognise the 'systematic injustice' of segregation and the justification of civil disobedience against it (Lyons, 1998: 47-49).⁶ This process, if correctly identified, perhaps says something about the possibility for a successful campaign of civil disobedience to create the conditions for its own justification in a democratic community. By this I mean that, through the strength of their arguments and the evidence of their sincerity, the civil rights movement eventually *won* acceptance from a large majority of the democratic community in America, both for their cause and their campaign. James Bohman describes a process whereby social critics, such as the civil rights movement, manage to alter preconceived assumptions and ideas through successfully introducing arguments into the public spheres of constitutional democracies (Bohman, 1996: 197-236, 241-242). In this sense civil disobedience as deliberative contestation can take heart from the capacity of at least *some* civil disobedience campaigns to eventually win at least *some* acceptance and approval from the rest of the democratic community, even if this process takes some time.

⁶ In a similar vein, Ronald Dworkin writes: 'we can say something now we could not have said three decades ago: that Americans accept that civil disobedience has a legitimate if informal place in the political culture of their community. Few Americans now either deplore or regret the civil rights and anti-war movements of the 1960s. People in the centre as well as on the left of politics give the most famous occasions of civil disobedience a good press, at least in retrospect' (Dworkin, 1985: 105).

In summary: studying the example of the civil rights movement suggests that civil disobedience as deliberative contestation does offer a reasonably plausible account of civil disobedience in constitutional democracies. The strategy of justification it recommends overlaps considerably with the influential arguments employed by Martin Luther King in his Letter. Of more difficulty is the reaction of the wider democratic community to the civil rights movement. The brief reflections offered here suggest that there is often widespread hostility to civil disobedience in actual democratic communities, which may prove a barrier to realising the receptive environment to civil disobedience that deliberative contestation recommends. However, the respect with which the movement is now generally regarded in American society suggests that protest movements themselves may be capable of challenging this hostility, by forcefully defending themselves and their actions in the public sphere.

III. Deliberative contestation and the Civil Rights Movement (2): Reforming the theory

As discussed above, as well as investigating the plausibility of a theory, examining actual cases of civil disobedience is also a good way of assessing whether or not the theory can be developed or improved from its current state. Examining actual cases of civil disobedience is a means of ascertaining whether or not the existing theory is missing out or downplaying potentially relevant ideas advanced by actors in the public sphere, and asking whether or not those

ideas can and should be incorporated. In this section I suggest that King's defence of civil disobedience occasions us to reflect on the significance of two ideas so far neglected by the deliberative contestation account: the *context* and *conduct* of the protest.

As well as providing reasons for the movement's actions, King also places the actions within a broader social, political and historical context. The consequence of doing this is to lend added weight to the reasons behind the decision to engage in civil disobedience. In King's letter, he cites the pervasive presence of racist attitudes and practices in American (particularly Southern) culture and society as a backdrop to the protests of the civil rights movement. In a long passage, King situates the civil rights movement within this context as a means of responding to those who claim that the movement is being too impatient in using direct action as a means of bringing about reform:

'When you have seen vicious mobs lynch your mothers and fathers at will and drown your sisters and brothers at whim; when you have seen hate-filled policemen curse, kick, brutalise and even kill your black brothers and sisters with impunity; when you see the vast majority of your twenty million Negro brothers smothering in an air-tight cage of poverty in the midst of an affluent society; when you suddenly find your tongue twisted and your speech stammering as you seek to explain to your six year old daughter why she can't go to the public amusement park that has just been advertised on television, and see tears welling up in her little eyes when she

is told that Funtown is closed to coloured children, and see the depressing clouds of inferiority begin to form in her little mental sky, and see her begin to distort her little personality by unconsciously developing a bitterness towards white people; when you have to concoct an answer for a five year old son asking in agonising pathos: 'Daddy, why do white people treat coloured people so mean?'; when you take a cross country drive and find it necessary to sleep night after night in the uncomfortable corners of your automobile because no motel will accept you; when you are humiliated day in and day out by nagging signs reading 'white' and 'coloured'; when your first name becomes 'nigger' and your middle name becomes 'boy' (however old you are) and your last name becomes 'John', and when your wife and mother are never given the respected title 'Mrs'; when you are harried by day and haunted at night by the fact that you are a Negro, living constantly at tip-toe stance never quite knowing what to expect next, and plagued with inner fears and outer resentments; when you are forever fighting a degenerating sense of 'nobodiness'; then you will understand why we find it difficult to wait.' (King, 1991: 72-73)

Of interest here is the length to which King goes in highlighting the day-to-day reality of life in southern America for black people. In responding to the charge that employing civil disobedience betrays an unwise impatience for change on the part of the civil rights movement, King does not content himself with reaffirming the injustice of the laws the movement opposes. Rather, he reaffirms the legal injustice *and* allows the critic to see the wider social and cultural

context within which the legal injustice exists and within which the decision to oppose the legal injustice through civil disobedience was taken. The relevant social and political context of the civil rights movement was not merely (in Rawlsian terms) the existence of unjust laws in a 'nearly just' state, but a society where racist attitudes in society are pervasive and impact upon their victims in a multitude of ways.

In King's account, these considerations of social context augment rather than replace the emphasis on unjust or undemocratic laws and policies. The main reason for engaging in the political protest is that segregation was both an unjust and an undemocratic policy. But King's description of the social context offers further credence to the claim that the political and legal injustices that the movement sought to protest offered reasonable grounds for civil disobedience. In particular, observations about the prominence of racist attitudes throughout American society cast a different light on the practice of segregation than the somewhat dry legalistic debate about its constitutional status. According to some, segregation did not violate black citizens' right to equal treatment, because of a distinction between 'separate' and 'equal' treatment (Carter, 1998: 132). This view maintained that whilst segregation did treat blacks separately (through provision of separate services to whites), it did not treat them unequally (the services they received were allegedly no better or worse than those that whites received). Without claiming that this argument has any legal or moral merit (for a convincing rebuttal see Dworkin, 1986: 381-389) placing it within a wider context of endemic racism undermines the claim that segregation did not violate

the equality of black citizens. The prevalence of prejudiced attitudes on the part of the white majority constitutes strong evidence that segregation was a reflection of these attitudes, and used as a tool to reinforce the sense that whites were in some sense superior to blacks.

As well as discussing the wider context within which the decision to disobey was taken, King also emphasises the moral significance of the manner or conduct of the disobedient act. King refers to conduct when he discusses another objection to the use of civil disobedience by the civil rights movement: the charge that such protest risks undermining respect for law generally. As well as countering this objection through arguing that unjust law undermines respect for political authority, King also suggests that dissenters can manifest respect for law through the conduct of their protest. He says:

'In no sense do I advocate evading or defying the law as the rabid segregationist would do. This would lead to anarchy. One who breaks an unjust law must do it *openly, lovingly* (not hatefully as the white mothers did in New Orleans when they were seen on television screaming 'nigger', 'nigger', 'nigger'), and with a willingness to accept the penalty. I submit that an individual who breaks a law that conscience tells him is unjust, and willingly accepts the penalty by staying in jail to arouse the conscience of the community over its injustice, is in reality expressing the very highest respect for law.' (King, 1991: 74)

King's belief that a willingness to accept punishment is a requirement of justified civil disobedience has been reiterated in much of the theoretical literature (for instance by Rawls and Habermas). Likewise the idea that violation of law must be 'open' has also received support in the literature, which has often placed some sort of 'publicity' condition on the act, both as a means of ensuring attention for one's cause and demonstrating the virtues of courage, conviction and sincerity. The idea of 'loving' violation is more ambiguous. What does it mean to break a law 'lovingly'? I think that the vocabulary here reflects both King's religious beliefs and the influence of Gandhi's theory of non-violent resistance on his thinking. Undertaking civil disobedience in a 'loving' manner involves a heightened respect and concern for those whom the act is targeted against and those whom it is likely to effect. King's example of the language used by those who opposed de-segregation illustrates the opposite of loving civil disobedience. By breaking law in such a way that one deliberately causes offence through language and rhetoric denoting hatred and a lack of respect for others, the moral standing of the act is undermined.

In particular, King's doctrine of open and loving civil disobedience involves a commitment to non-violent means of protest. He claims to have 'constantly preached that non-violence demands that the means we use must be as pure as the ends we seek...it is wrong to use immoral means to attain moral ends' (King, 1991: 83). Practitioners and philosophers have frequently adduced non-violence as a necessary though not sufficient condition of justified civil disobedience. The reason why this conduct related issue is so central to discussions of civil

disobedience is that one of the first questions one asks when discerning the moral standing of an act is what impact the act has on others or the surrounding environment in general. A strong reason for claiming that an act was unjustified or immoral is that the act in question had a serious effect on the physical or mental health of others, or that the act resulted in others bearing unacceptably high costs. By avoiding harm to others, actors engaged in civil disobedience reduce the possibility that their act can be criticised in this manner. Adopting non-violent means, as well as embedding other values in one's conduct (publicity, King's notion of love, or respect for others), narrows the number of objections that can be brought to bear against the act and therefore makes it easier to justify.

I want to leave King's text now and reflect on the picture of justification that has emerged. Three general categories or variables have been identified as significant for justification: the laws or policies opposed by protesters, the wider social context of the protest and conduct of the protest. Whilst the deliberative contestation theory has cohered nicely with what King has to say about the principles that protesters appeal to when engaging in justified civil disobedience, so far it has said little about these other two variables. Can the theory developed in the earlier chapters incorporate these in some respect?

There are certainly difficulties in trying to incorporate conduct and context considerations into a general theory of civil disobedience, particularly in the form of concise and easily applied principles. By their very nature context related

considerations will vary from case to case, and it is difficult to draw up any general points about context that will usefully apply across a range of instances. Conduct related considerations are more easily translated into principles, for instance a principle mandating non-violence, but are notoriously difficult to interpret – for instance, how do we define ‘violence’? as a purely physical violation, or as a potentially ‘mental’ or ‘emotional’ violation? as being directed purely against persons, or also against property?

Despite difficulties in incorporating context and conduct considerations, the role they play in King’s account suggests that we should not reject them out of hand. King’s invocation of the social context of segregation and his emphasis on the non-violence of the civil rights movement do add to his defence of civil disobedience, in that they support the main reasons he offers for engaging in it. Moreover, it is intuitively reasonable to assume that when protesters decide whether or not to engage in civil disobedience, and when observers judge the moral standing of an act of civil disobedience, they will take considerations of conduct and context into account. Whilst it is difficult to generate very much precision in the incorporation of conduct and context into the theory developed throughout this essay, it is possible to say something about how a specifically *deliberative* theory might regard context and conduct.

The attitude a deliberative conception of civil disobedience assumes towards conduct can be spelt out fairly clearly. Civil disobedience is understood as a contribution to ongoing deliberation throughout the public sphere. Civil

disobedience is orientated towards *communicating* concerns about laws and policies that frustrate public political principles. In general terms, communication can be achieved through a variety of means – through symbolic acts of violence or terror as much as symbolic acts of non-violent protest. However, in the deliberative contestation account, communication between citizens is understood as having a particular *moral* dimension. When citizens engage in public deliberation they do so in such a way that they respect the principles of public deliberation, in particular that deliberation is geared in the first instance towards reason giving and persuasion, only in the final instance towards a strategic compromise, and never towards coercion.

Extending this to civil disobedience, questions about its manner or conduct become central. The aim of deliberative civil disobedience should be to publicise views with the aim of rationally persuading others, for instance by appealing to their sense of justice, their sense of fairness or their capacity to reason and deliberate. This form of persuasion through deliberation would be difficult if not impossible to reconcile with civil disobedience carried out to *coerce* or *harm* others. In this case the aim is not to persuade or appeal, but to bully and demand; civil disobedience is not a contribution to deliberation, but a show of brute strength or power that displays no intention of persuading through reason or argument. This form of communication is inconstant with the idea of democratic deliberation upon which the justification of civil disobedience is grounded.

The deliberative contestation account will place a high premium on civil disobedience carried out in such a way that it is intended to persuade rather than to coerce. Following Iris Marion Young we can say that 'one does not attempt or threaten to harm or eliminate those with whom one disagrees, or those who challenge one's privilege, or those one believes are dominative or oppressive, or just plain wrong' (Young, 2000: 48). Compare this to Rawls who states 'to engage in violent acts likely to injure and hurt is incompatible with civil disobedience as a *mode of address*...any interference with the civil liberties of others tends to obscure the civilly disobedient quality of one's act' (my emphasis, Rawls, 1972: 366). There should, then, be a preference for a non-violent code of conduct for civil disobedience. At this point we face the problems mentioned above about identifying what constitutes violence. Unfortunately, but perhaps unsurprisingly, it is very difficult to come up with a non-controversial definition of violence. As Young points out, often the idea of violence is extended to incorporate activity that should more fairly be described as merely 'rowdy' or 'disruptive', like street protests or sit-ins (Young, 2000: 48). Neither of these forms of activity is geared towards injuring or hurting others, to use Rawls' expressions, but simply constitute dramatic ways of making a point, perhaps in the face of a refusal to listen on the part of others.

In response to difficulties in deciding on a standard of violence, I suggest that the deliberative contestation account prescribes as a necessary condition of justification that *civil disobedience avoid, as far as possible, hurt or injury to others*. In this way the conduct of civil disobedience respects the idea of public

deliberation between free and equal citizens. The precise interpretation of what does constitute hurt or injury should be left, as much as possible, to be decided on a case-by-case basis. However, we can with some certainty identify some forms of conduct that are wholly unjustifiable from a deliberative perspective: employing weapons (e.g. guns, knives, bombs) against others in the course of demonstration, seeking to attack innocent bystanders, seeking to cause widespread suffering through physically or emotionally damaging acts. These forms of activity are more associated with terrorism than with the form of principled protest geared towards the promotion of deliberation throughout society.

Whilst these clear forms of violence can be ruled out, there is still some room for ambiguity over the range of disruptive activity that protesters might engage in to make their point. To quote from Young again, 'disorderliness is an important tool of *critical communication* aimed at calling attention to the unreasonableness of others....disorderly, disruptive, annoying, or distracting means of communication are often necessary or effective elements in such efforts to engage others in debates over issues and outcomes' (Young, 2000: 49-50). Whether or not a particular protest goes beyond the bounds of what seems reasonable, and turns from being disruptive to potentially hurtful or injurious activity, should be a question decided in discussion of *that specific protest*, and informed by a judgement about how far it does and how far it does not respect the idea of deliberative democracy from which acts of civil disobedience derive their justification.

The attitude deliberative contestation adopts towards context is more complex. To reiterate a point made earlier, context is by its very nature specific and particular, and not very amenable to generalisation. It is impossible in advance to predict all of the contextual variables that may be morally significant in each and every case of civil disobedience. Like the issue of the precise interpretation of hurt or injury, the relevant contextual factors must, by and large, be left to a case-by-case assessment. However, we can say a little about the kind of contextual issues that a deliberative approach to civil disobedience is likely to find relevant. They are the kind of issues and information that pertain to the *general health and robustness* of deliberative politics in the relevant political community. These kinds of issues can be applied to claims made about rights and deliberative inequalities or inadequacies.

If a group engages in civil disobedience on the grounds that some law or policy seriously violates their rights, then it makes sense to look at the wider social or historical context in at least two respects. Firstly, what is the general standing of that group within the society? If the group is generally downtrodden or a victim of widespread abuse or prejudice, then their claim about rights violation may gain credence. The rights violation would occur in the context of a wider pattern or history of discrimination, abuse, or misfortune, which may have the knock-on effect of undermining that group's capacity to participate in deliberative politics. Moreover, widespread discrimination against that group within society might be evidence that the malicious preferences of those in the majority have played a

strong role in the creation and/ or continuance of the law or policy the group oppose. All this adequately captures the dynamics at work in the civil rights movement's campaign of civil disobedience against segregation, a policy operative against the backdrop of widespread racism throughout American society. Secondly, one could investigate the general level of justice in the relevant political community. Claims about rights-violation on the part of one group may (but not necessarily) seem more credible against the backdrop of endemic rights-abuses throughout the society. In this case, the allegedly rights-violating law or policy can be seen as part of a general pattern of unjust law on the part of the state or government.

If, on the other hand, a group engages in civil disobedience on the grounds that there is some kind of deliberative inadequacy in existing states of affairs, then context is relevant in at least three respects. If groups claim that they have been effectively excluded from democratic deliberation, then the general inclusiveness of the republic clearly becomes relevant. A tendency for the polity to exclude minority groups from its deliberations may tend to strengthen the claim made by a particular group that they have been excluded. If groups claim that a discussion or decision has been unduly biased by a powerful interest group, then either a pattern of domination on the part of that group (for instance a tendency for that group to get its own way over a course of time), or a tendency for democratic deliberation to be high jacked by powerful groups (for instance a tendency for debate and decisions to reflect particular rather than general interests) becomes relevant. If either of these claims are true, or seem to be

generally supported through referring to the general state of deliberative politics, then the charge made by the group engaged in civil disobedience may seem more plausible. Finally, if groups engaged in civil disobedience claim that discussion and decisions have failed to track all of the relevant information in a particular case (for instance if discussion over industrial policy has failed to take into account certain environmental considerations), then the general capacity of deliberative procedures to channel all relevant information becomes relevant. This could be looked at both in terms of the specific kind of information alleged to have been neglected, and the general quality of deliberative practices. In all three cases, the relevant social or political context relates to the general health of deliberative politics. Civil disobedience in the context of more general failings on the part of deliberative institutions may seem that much more plausible and defensible.

Overall, how has the incorporation of conduct and context considerations impacted upon the picture of justification offered by the deliberative contestation account? The two supplementary ideas advanced here do not radically alter the fundamental basis of the deliberative contestation theory. According to that theory, the central variables when discussing the justification of civil disobedience in constitutional democracies are the reasons given or principles invoked by the protesters. What counts fundamentally is a (reasonable) claim that rights have been violated, or not recognised, or that deliberative practices have failed in some significant respect (e.g. they have been biased, or

exclusionary, or uninformed). Making this appeal to principle is still what we may call the primary necessary condition of justification.

However, the discussion of conduct introduced another condition that must, in some sense, be met in order for civil disobedience to be regarded as justified. That condition was that, as far as possible, civil disobedience should avoid injury or harm to other persons. If civil disobedience blatantly does not respect this condition, then it will not be justifiable, irrespective of the strength of the protesters' case against any particular law or policy. This condition derives from the deliberative conception of democracy that the theory draws upon for its normative resources.⁷ The discussion of context has proved slightly different. In any given instance of civil disobedience, there may be background issues or tendencies in the relevant political system or society that lend further credence to the decision to engage in civil disobedience. These contextual issues do not constitute necessary conditions of justification, but can augment already justified acts of civil disobedience in order to strengthen the case made by the protesters.

One of the practical consequences of this last point is that we can generate *stronger* and *weaker* justifications of civil disobedience. Sometimes, a justification of civil disobedience will or can include strong arguments based on

⁷ Compare with Rawls who says, 'I should like to emphasise that the constitutional theory of civil disobedience rests solely upon a conception of justice. Even the features of publicity and non-violence are explained on this basis...At no point has a reference been made to other than political principles; religious or pacifist conceptions are not essential.' (Rawls, 1972: 384-385) The relevant point here is that, for Rawls as for deliberative contestation, non-violence is derived from the political conception or theory that provides the normative resources for discussing and justifying civil disobedience.

political principle, self-referential considerations about the non-harmful or non-injurious conduct of the protesters, *and* considerations about the social and political backdrop that tends to support the decision to engage in protest. The actions carried out by King are perhaps paradigmatic in this respect. One of the reasons why it is such a well-known case of civil disobedience is, amongst other things, that the case in favour of it was so strong. At other times a justification for civil disobedience may be less robust than that supplied by King. It may support itself through reference to a belief about rights or inadequate deliberation, be sufficiently non-harmful or non-violent, but not be able to point to any particularly supportive social or political context. This does not make the act unjustified, but it does perhaps lessen the strength of the case for it. The fact that the deliberative contestation theory can account for differences in degree of justification, and that it can explain why some acts will tend to be more and some less justified, counts in its favour. It reveals the sensitivity of the theory to the constellation of variables that come into play when assessing different acts of civil disobedience, without losing sight of the centrality of public political principles.

To summarise: in this section I have shown how the theory might go about incorporating ideas discussed in King's Letter that it has so far neglected or downplayed. Ideas of conduct and context were included in such a way that they cohere with the deliberative conception of democracy that resides behind the theory.

Conclusion: The theory and practice of civil disobedience

In this chapter, civil disobedience as deliberative contestation was compared with a prominent case of civil disobedience to investigate (i) whether or not it offers a plausible set of normative prescriptions and (ii) whether or not it can and should respond to relevant ideas expressed by political protesters in the public spheres of constitutional democracies. Through reflecting on the experience of the civil rights movement, and discussing Martin Luther King's 'Letter From Birmingham City Jail', I argued that deliberative contestation does offer a reasonably plausible theory of civil disobedience, and can be developed in the light of relevant concerns expressed by King. The comparison between deliberative contestation and the civil rights movement has been offered as an example of how one might productively investigate *both* the theory and practice of civil disobedience. By advocating the usefulness of referring to actual cases of civil disobedience, I support a *continuing dialogue* between political theorists studying the topic and citizens who engage in or judge campaigns of civil disobedience in constitutional democracies. Through this ongoing dialogue, one can continually reassess the plausibility and completeness of a working theory of civil disobedience, as well as illuminate actual discussions of civil disobedience in the public sphere. Allowing for the fact that this dialogue is ongoing, and that other comparisons might occasion further changes or pose different challenges, I hope that this chapter has gone some way to achieving the aims stated at the beginning: namely both *consolidating* the theory and *developing* the theory.

Concluding Remarks: Civil disobedience and democratic citizenship

In this essay I have elaborated a theory of civil disobedience by drawing on ideas in contemporary political philosophy. I suggested that civil disobedience in a constitutional democracy becomes politically justifiable when citizens reasonably believe that laws or policies seriously violate basic liberties, when citizens reasonably believe that the democratic community should acknowledge the need for new rights, and when citizens reasonably believe that deliberative principles have been violated. When civilly disobedient citizens appeal to ideas of rights and democracy, they appeal to public political principles that regulate political power in constitutional democracies. One of the reasons that citizens have for complying with the law in constitutional democracies is that laws generally respect their rights and liberties and that laws are made in a sufficiently democratically deliberative fashion. Civilly disobedient citizens can reasonably claim that when laws do not respect the rights and liberties of citizens, or when laws are not made in a sufficiently deliberative fashion, then one of the reasons we have for complying with the law in a constitutional democracy does not hold.

In the introduction I began by discussing Thoreau's well-known argument in defence of civil disobedience. I suggested that Thoreau established an unnecessarily strong tension between the demands of citizenship and the demands of conscience. I said that a theme of this essay would be illustrating how a disposition to engage in conscientious acts of civil disobedience might actually cohere with a full account of democratic citizenship in a constitutional

democracy. One of the features of the argument so far has been ascertaining a strong connection between justifications for civil disobedience and the public political principles that underlie a constitutional democratic regime. Insofar as citizens in such a regime are supposed to feel an attachment to these principles, and to be generally committed to promoting and defending them, the connection between civil disobedience and democratic citizenship should be fairly clear. In this concluding chapter I want to bring together some of the ideas already touched upon, and argue that cultivating a disposition to engage in civil disobedience is one way in which persons can pursue the virtues of democratic citizenship. In so doing I intend to *supplement* the theory developed in this essay.

Initially I briefly elaborate on two influential accounts of democratic citizenship: one from a liberal perspective and one from a republican perspective. Both accounts stress the importance of civic virtue and civility as components of democratic citizenship. Both accounts offer scope for incorporating a disposition to engage in non-violent civil disobedience as a component of democratic citizenship. Incorporating such a disposition can be defended by referring to the following liberal/republican virtues: loyalty to the principles that regulate a constitutional democracy, the desire to narrow the gap between principles and practices in a constitutional democracy, the commitment to highlighting and publicising the interests of powerless or neglected members of the democratic community, and concern for the common interests of the democratic community. These virtues constitute what Kant calls 'imperfect ethical duties', which means

that they set general *ends* that persons should pursue but leave persons with a degree of freedom in selecting how they pursue these ends (Kant, 1996: 152-153). Civil disobedience can be seen as one way in which persons may pursue these ends, provided they reflect carefully on whether it is an appropriate method to adopt.

I. Democratic citizenship from a liberal and republican perspective

In this section I describe two accounts of virtuous democratic citizenship. The two accounts I examine are William Galston's account of liberal political virtues, and Philip Pettit's account of republican civility. Though there are differences between both accounts, there is shared emphasis on certain key qualities and dispositions. Taken together, the accounts provide the basis for analysing how a disposition to engage in justified, non-violent civil disobedience might embed itself within a broad ideal of democratic citizenship.

In recent times, there has been a revival of interest in the idea of citizenship in political philosophy. According to Will Kymlicka, this interest is attributable to theoretical developments – in particular attempts to transcend the liberal/communitarian divide – and political developments – for instance concerns about voter apathy and welfare dependency (Kymlicka, 2002: 284). This interest has led to reflection on how the justice, democratic health, and stability of a constitutional state depends not merely on institutional arrangements and government policy, but also on the attitudes and patterns of

behaviour of the majority of citizens. According to Kymlicka, examples of the attitudes and qualities relevant for citizens in a democratic state are: 'their sense of identity, and how they view potentially competing forms of national, regional, ethnic, or religious identities; their ability to tolerate and work together with others who are different from themselves; their desire to participate in the political process in order to promote the public good and hold political authorities accountable; their willingness to show self-restraint and exercise personal choices which affect their health and the environment' (Kymlicka, 2002: 285).

Growing interest in the attitudes and patterns of behaviour of citizens is not limited to studies of citizenship, but is also reflected in recent developments throughout political philosophy. For instance, there is an increasing awareness of the interrelation between liberal-democratic institutions and the support those institutions receive from a healthy and robust liberal-democratic culture. Brian Barry discusses the conditions necessary for a stable and just set of liberal-democratic institutions. One of these conditions is that citizens feel a 'sense of empathy with their fellow citizens', 'a sense of solidarity...fostered by common institutions' and 'a willingness...to make sacrifices for the common good' (Barry, 2001: 79-80). Jürgen Habermas is aware of the need to secure some minimum degree of social solidarity within a democratic community if principles of deliberative democracy and social justice are to be realised. He speaks of the need to foster a robust sense of 'constitutional patriotism' within democratic states, where persons are actively motivated by principles of right, democracy

and mutual respect. Habermas is not forthcoming on the implications of constitutional patriotism, but clearly believes that it must feature in the public culture of democratic states.¹ He writes: 'the universalism of legal principles manifests itself in a procedural consensus, which must be embedded through a kind of constitutional patriotism *in the context of a historically specific political culture*' (Habermas, 1998: 226). More recently, the Marxist political philosopher G.A. Cohen has criticised John Rawls and other liberals who make the basic structure of society the sole subject of their theories of justice, rather than also the attitudes and behaviour of persons and groups acting within that structure. He claims that without fostering an 'ethos' or a 'culture' of justice and social solidarity, the kind of just re-distribution of economic and social resources that liberals like Rawls want to see implemented in constitutional democracies will not transpire (Cohen, 2000: 142-143).

This growing interest in the role that citizens, not just institutions, play in contributing to stable and just social relations now means that it is fairly commonplace for political philosophers to include discussions of citizenship and civic virtue in their political treatise. Two prominent examples of this trend are William Galston and Philip Pettit. Galston has written extensively on the role that the virtues of good citizenship play in stabilising and harmonising political communities, especially those with liberal political institutions. He has recently proposed a schema offering four types of virtues: general virtues required for all political communities, social virtues required for a liberal society, economic

¹ For a critique see Fine and Smith (2003).

virtues required for a healthy liberal economy, and political virtues for a healthy liberal polity (Galston, 1991: 221-227; Kymlicka, 2002: 288). The most relevant virtues for discussing the civic value of civil disobedience are general and political virtues.

According to Galston certain 'general' virtues are necessary for the health and stability of *any* political community. These virtues include courage, law-abidingness, and loyalty (Galston, 1991: 221). Courage is needed in those extraordinary circumstances where citizens may be required to fight and die to ensure the survival of the political community. Law-abidingness is understood as a general disposition to accept law as legitimate and obey it without recourse to direct threats or sanctions. Galston is quick to point out, however, that the general disposition to obey the law does not prohibit disobedience, but it does mean that 'a heavy burden of proof must be discharged by those who propose to violate the law'. Loyalty is understood as the willingness of citizens to understand, accept and to act on the core principles of one's society. According to Galston, loyalty is particularly important in liberal societies because they tend to be organised around 'abstract principles' and not 'shared ethnicity, nationality, or history'. The virtue of loyalty is very much like Habermas' 'constitutional patriotism', which demands an identification with the organising principles of rights and democracy that underlie the constitution of a liberal state, rather than identification with others on the basis of shared ethnicity.²

² There are also similarities with Derek Heater's discussion of loyalty as a virtue of good citizenship: 'loyalty...derives from belief in the values which the object of loyalty stand for' (Heater, 1990: 193).

According to Galston, certain 'political' virtues are necessary for the health and stability of a specifically *liberal* community. These virtues include citizenship, leadership and general political virtues (Galston, 1991: 224-227). Virtues of citizenship are the capacity to recognise and respect the rights of others; the capacity to judge the talent and character of candidates running for office; and the capacity to evaluate the performance of political leaders. Leadership virtues pertain to those who occupy positions of power in liberal states, and include: the ability to work within constraints set by social and cultural diversity; the ability to forge a sense of collective purpose; the willingness to resist the temptation of playing to the gallery; and the capacity to lead public opinion and not be lead by it. According to Galston, there are two other general political virtues. First, citizens must be willing to engage in public discourse in order to resolve political disputes, which involves listening to a range of different view-points and setting out one's own views clearly and intelligibly with the aim of persuading (not coercing) others. Second, citizens must be willing to try and narrow the gap between the principles and practices of a liberal regime, which might mean making an appeal to 'collective convictions' in order to highlight 'social imperfections' (Galston, 1991: 227).

Whilst Galston thinks that the above virtues constitute a more or less coherent characterisation of 'good citizenship', he is alive to the possibility that there may be tensions between particular virtues. An example he highlights, and one very relevant to this essay, is a potential tension between the virtue of general law-

abidingness and the virtue of wanting to narrow the gap between principles and practices in liberal societies. The former argues in favour of respecting the law, whereas the latter might support public campaigns of legal and illegal political protests geared towards the removal of perceived injustices. According to Galston, this can be characterised as 'a tension between social transformation and law-abidingness, which can be resolved prudentially only with reference to the facts of specific cases'. Galston points out, however, that this kind of reflection reveals 'a tension rather than a contradiction' between different liberal virtues. This is because 'the virtue of law-abidingness embodies not the absolute priority of law but, rather, a presumption in favour of the law that can be rebutted in a narrow range of instances' (Galston, 1991: 227).

In his treatise on republicanism, Philip Pettit offers an account of the virtues that *republican* citizens must possess if society is to be both stable and free from domination. According to Pettit, 'the law must be embedded in a network of norms that reign effectively, independently of state coercion, in the realm of civil society' (Pettit, 1997: 241). The kind of 'network of norms' that Pettit has in mind is the pattern of behaviour associated with civic virtue or – Pettit's preferred phrase – *civility*. Generally speaking, civility coheres with the principles of non-domination and contestatory democracy that underlie Pettit's republican vision. Non-domination is achieved when all persons in society are free from the experience or the threat of arbitrary interference from others. A person has the power to arbitrarily interfere with someone when he or she can alter the situation of another without taking into account the interests or opinions

of that person (Pettit, 1997: 52-58). Democratic contestation is a means for citizens to challenge government law and policy, and other actors in civil society, if they reasonably believe that they are being dominated, or that they are under threat of domination, or that their interests and opinions are not taken into account in the making of decisions that effect them. Civility involves citizens recognising these principles, and embedding them in their attitudes and behaviour.

Pettit cites three reasons for supporting civility. First, in order that all citizens are genuinely free from the dangers of domination, everyone must accept and act from the principle of non-domination independently of legal sanctions. This is because the law may not be able to fully protect people from the effects of non-domination: 'arbitrary interferers' might think that if they can hide their dominating activities from the state then they can afford to take the risk of interfering with others (Pettit, 1997: 246). Second, in order that society is aware of the interests and opinions of all citizens – and thus avoid the domination that might arise as a result of ignorance or neglect – there have to be persons willing to promote and publicise these interests and opinions. According to Pettit, this might involve publicising the interests and concerns of neglected or marginalised groups within the republic, or publicising interests and concerns which might be general in nature – i.e. in the common interest – but which are not reflected in law (Pettit, 1997: 247-249). Thirdly, in order that the republic is made aware of all offences against republican laws and norms, ordinary citizens must maintain 'eternal vigilance'. This means that citizens must be alert to violations of

republican norms and laws by other citizens, and also that they are alert to the danger of violations of these norms by government action (Pettit, 1997: 249-250).

For Pettit, civility involves embedding republican norms in one's own actions and acting according to the demands of republican norms. According to Pettit, the principles of republicanism cannot be realised in actual political contexts unless republican constitutions are bolstered by widespread norms of civility. In making the point that the decisions and behaviour of persons acting within a set of political institutions impact on the realisation of republican principles, Pettit advances an argument similar in form to G. A. Cohen's arguments about the scope (or 'site') of principles of justice. According to Cohen 'principles of justice apply not only to coercive rules but also to the pattern in peoples' (legally) uncoerced choices' (Cohen, 2000: 142). Pettit's argument that citizens in a republic must accept and act from the principle of non-domination resonates with this point.

Pettit leaves open the issue of whether or not the imperative of displaying civility will lead to 'an active, ever restless citizenry', vigilant in respecting and defending republican principles. However, he does indicate that in 'advanced societies' a restless and active citizenry may well be required by republicanism. He says, 'at least in some areas, say areas of environmental pollution, the power of offenders to reassure ordinary people – in effect, to tranquillise them – is so great that it may require an active opposition, even an opposition of enthusiasts

and crusaders, in order to ensure that offences are effectively identified and offenders made to answer for what they have done' (Pettit, 1997: 251).

Both Galston and Pettit have different accounts of the virtues of democratic citizenship. Galston presents his picture of citizenship as a distinctively *liberal* view, whereas Pettit presents his as a distinctively *republican* view. Nonetheless, I think that there is sufficient overlap to use both accounts as the basis for arguing that a disposition to engage in justified, non-violent civil disobedience coheres with the virtues of democratic citizenship. In particular, the emphasis that both accounts place on citizens recognising and being motivated by the political principles that underlie their society is especially relevant to my discussion. In the next section I describe how civil disobedience as deliberative contestation fits into a broader account of democratic citizenship.

II. Civil disobedience and the virtues of democratic citizenship

Civil disobedience as deliberative contestation recommends that civilly disobedient citizens justify their actions by appealing to public political principles of rights and democracy. A disposition to engage in this kind of civil disobedience can be grounded in the ideals of democratic citizenship sketched by Galston and Pettit.³ In particular, civil disobedience represents one way in which citizens can pursue the following political virtues: (i) loyalty to the principles that regulate their society, (ii) a desire to close the gap between principles and

³ For a similar argument – defending civil disobedience as a way of pursuing the virtues of democratic citizenship – see McWilliams (1969) 223.

practices in their society, (iii) a desire to defend the interests of neglected individuals and groups within (and beyond) their society, and (iv) a desire to promote the common interest of the society. I discuss each of these virtues, and their relation to civil disobedience as deliberative contestation, in turn.

(i) Both Galston and Pettit defend the idea that citizens should be loyal to the political principles that govern their society. Both writers claim that it is important for citizens to recognise and understand these principles, and that citizens are prepared to act according to the requirements set by the principles. According to civil disobedience as deliberative contestation, citizens engage in non-violent but illegal acts of protest when they sincerely and reasonably believe that principles of rights and democracy are not being respected. This might occur when government law or policy violates the rights of citizens, when the democratic community does not acknowledge a reasonable case to introduce new rights in response to new problems and concerns, or when democratic deliberation is biased, insufficiently inclusive, or insufficiently informed. When civilly disobedient citizens protest against such violations they demonstrate the virtue of loyalty and commitment to the principles that govern their society. They demonstrate that they recognise and accept these principles and, by virtue of the reasonableness of their beliefs, endeavour to convince the wider democratic community that they understand and soundly interpret those principles. They are also prepared to go to great lengths to demonstrate their

loyalty to these principles, and in so doing indicate a disposition to be motivated to action by these principles.⁴

(ii) By engaging in civil disobedience, citizens do not merely indicate their loyalty to the principles that regulate their society. Civilly disobedient citizens also display the virtue, defended by Galston, of seeking to close the gap between principle and practice in society, and the virtue, defended by Pettit, of being vigilant in detecting and publicising violations of those principles. Civilly disobedient citizens display the virtues of wanting their society to remain committed to its fundamental principles, and of not tolerating excessive deviations from those principles. In particular, they demonstrate a commitment to *integrity* in government: they do not want their representatives or the wider democratic community to on the one hand profess a belief in fundamental principles like rights and democracy, and on the other hand to act in such a way that they flout those principles. They oppose *hypocrisy* in government: they do not want to live in a society that adheres to its basic principles by word only. They endeavour, by their actions, to publicise and shame those who violate the public political principles that regulate their society, and to try and reform or remove the violation. Moreover, they do so in such a way that they respect the virtue of *general* law-abidingness defended by Galston. Civilly disobedient citizens accept that there should be general compliance with the law. By

⁴ In their account of justified civil disobedience, Bengoetxea and Ugartemendia develop the analogy made earlier between Galston's 'loyalty' and Habermas' 'constitutional patriotism'. They claim that: 'in adopting a committed attitude to constitutional values, civil disobedience becomes a fundamental incentive and support for constitutional discourse: it enhances a dynamic, discursive, critical or open idea of [a] constitution...the civil disobeyer becomes a "constitutional patriot" in [a] Habermasian fashion' (Bengoetxea and Ugartemendia, 1997: 439).

engaging in the justificatory discourse recommended by deliberative contestation, civilly disobedient citizens explain to others that, in their considered opinion, the reasons for general compliance do not extend to certain unjust or undemocratic laws. They accept the strong 'burden of proof' that Galston demands from those who would dispute the case for complying with particular laws.

(iii) The final two ways in which a disposition to engage in principled civil disobedience coheres with the virtues of democratic citizenship derive more from Pettit's conception of civility than Galston's conception of civic virtue. Citizens who engage in civil disobedience as deliberative contestation might be motivated by a concern for publicising interests and opinions of powerless or neglected groups and individuals. If this is the case, then such citizens are realising one of the virtues of civility defended by Pettit: namely promoting concerns and interests in order that society in general and the state in particular is in a position not to arbitrarily dominate less powerful citizens. One of the ways in which civilly disobedient citizens might pursue this virtue is by protesting the violation of a certain group's rights.⁵ The civil rights movement offers an example of how civil disobedience can be used to promote the interests and concerns of groups who believe that law, and society in general, treats them unfairly.

⁵ In his own characterisation of republican citizenship, David Miller requires that citizens be 'willing to take active steps to defend the rights of other members of the political community' (Miller, 2000: 83). Miller's point is analogous to Pettit's, in that both place a high premium on the willingness of some citizens to take active steps in promoting the interests and concerns of powerless or oppressed groups (these citizens can come from within the ranks of these groups, or from sympathetic 'outsiders').

Civilly disobedient citizens might also pursue this virtue by publicising the interests of those outside of the democratic community, but who are nonetheless seriously affected by the outcomes of the community's deliberations. Those who protest on behalf of third world or developing countries, who allegedly suffer from the effects of economic policies imposed by developed countries, offer an example of this kind of civility in action. Alternatively, those who protest when powerful actors manipulate deliberation to pursue their own interests can be seen as promoting the interests and concerns of those who lose out as a result of that manipulation. Civil disobedience against unduly powerful groups in society might be motivated by a concern for less powerful groups who lack the political resources of power and influence enjoyed by others (Young, 2003: 111).

(iv) Finally, citizens engaged in civil disobedience as deliberative contestation might be motivated by a concern to publicise the general or common interests of the political community. If this is the case, then citizens display another virtue of republican civility: namely the desire to publicise interests and concerns that promote the general interest of the political community.⁶ In a sense, any act of civil disobedience carried out in order to protest violations of public political principles could be construed as an attempt to promote the general interest of the political community, at least if its general interest is partly dependent on the protection and development of the principles that bind the community together. Civil disobedience as deliberative contestation might promote the general interest

⁶ Miller also stresses the importance of cultivating a concern for the 'common interest' through a politics of 'public service' (Miller, 2000: 83).

of the political community in more specific ways. Civilly disobedient citizens might embody this virtue if they protest against the influence of powerful groups who manipulate deliberation so that outcomes reflect their own interests, rather than the interests of the wider community. Those who protest against the alleged power of corporations to escape state regulation might protest against the potential costs to the democratic community. For instance, if corporations are allegedly capable of using political power and influence to escape, delay or dilute legislation designed to restrict their ability to carry out environmentally hazardous activity, then civilly disobedient citizens might campaign to highlight the potential dangers for the wider community.⁷

A disposition to engage in non-violent civil disobedience, then, can be seen as one way in which citizens can pursue the virtues of good citizenship. It is important to stress that referring to the virtues of citizenship in this way does not commit us to the view that citizens are *obliged* to engage in civil disobedience in certain circumstances. To make this claim is to misunderstand the nature of the virtues of good citizenship, and the requirements that they impose on us. To go back to the virtues I have drawn on above – loyalty to public political principles, a desire to close the gap between theory and practice, a desire to promote the interests of less powerful groups, and a desire to promote the general interest – it is clear that they do not necessarily prescribe specific actions. For instance, if

⁷ Pettit uses the example of environmental campaigners in his elaboration of a politics of the 'common good': 'It is extremely doubtful that governments would have been forced to take account of environmental considerations, even in the inadequate measure to which they currently do so, if people were not generally responsive to a norm requiring concern for the common good' (Pettit, 1997: 248).

one displays the virtue of loyalty to the principles that regulate one's society, one is not necessarily committed to carrying out a range of specific actions. Rather, one is committed to embedding an *aim* or an *end* in one's overall conduct. Displaying loyalty to certain principles might involve carrying out a range of different actions, depending on particular situations. It might involve merely defending principles in conversational contexts, or respecting principles in one's daily actions – for instance by not infringing other people's rights, or not seeking to 'dominate' others. Loyalty to principles is something we aspire to and hope to demonstrate throughout the course of our lives, not a principle that tells us what to do in any and all given situations.

This account of virtues is anticipated in Kant's account in the second part of the *Metaphysics of Morals*. According to Kant, virtues constitute *ends* which good persons should set themselves – ends that we freely adopt, rather than ends that are imposed on us.⁸ Kant calls the duties of virtues *imperfect* duties, because they do not give laws for actions, but only for maxims of actions.⁹ He says: 'if the [moral] law can prescribe only the maxim of actions, not actions themselves, this is a sign that it leaves a playroom (*latitudo*) for free choice in following

⁸ Consequently Kant refers to virtues as being concerned with 'inner morality', in contrast to right, which is concerned with 'outer' conformity to laws and can hence be imposed (by the state). According to Kant, an external agent cannot force us to adopt certain ends, or to have certain motivations, as this is a capacity that only we ourselves possess (Kant, 1996: 145-146).

⁹ Kant defines maxims as 'a subjective principle of action, a principle which the subject himself makes his rule' (Kant, 1996: 18). According to Onora O'Neill 'maxims are subjective practical principles, that is principles of action which inform the action of an agent – a subject – at some time. The sense in which maxims are subjective is not, then, that their content must be subjective as opposed to objective: in dutiful action the content of an agent's maxim would be objective. Maxims are termed 'subjective' to indicate that here we are talking about the role of a principle (a principle-token) in the life and action of some subject at or through a given time' (O'Neill, 1996: 81).

(complying with) the law, that is, that the law cannot specify precisely in what way one is to act and how much one is to do by the action' (Kant, 1996: 153). Virtues set down ends that we hope to pursue throughout the course of our lives, they do not tell us what to do but leave us with a 'playroom for free choice'. In short, they allow us to judge how best to pursue the virtues in particular contexts. In Onora O'Neill's characterisation, 'a principle of action that cannot be tied down to specific acts must, of course, still have some content, but this content may be given by constraining the end of action rather than more specific prohibitions or prescriptions...their enactment will be revealed in action in highly varied ways' (O'Neill, 1996: 87).

The virtues of citizenship, as discussed by Galston and Pettit, appear to have this character. They set out ends we should attempt to pursue throughout the course of our lives as citizens in a democratic community, not principles that will necessarily prescribe or prohibit certain actions.¹⁰ It is in this sense that a disposition to engage in civil disobedience can be defended as *one way* in which citizens might act virtuously in a democratic community. Engaging in justified civil disobedience is one option amongst several possible courses of action available to good citizens. It is one way in which they can pursue the ends set by the virtues of good citizenship – promoting the general interest of society, for instance, or closing the gap between principle and practice in their society.

¹⁰ As O'Neill points out, sometimes virtues might operate in this fashion – by clearly prohibiting certain kinds of actions. However, most virtues allow for a fairly wide scope for choice as to how best to pursue the virtues in particular contexts (O'Neill, 1996: 87 ff).

The sense in which civil disobedience is one way in which persons can demonstrate the virtues of good citizenship highlights the significance of *good judgement* on the part of civil disobeyers. In order that civil disobedience as deliberative contestation coheres with the wider ideal of democratic citizenship sketched above, it is important that those who engage in it reflect long and hard before making that choice (Rawls, 1972: 389). It may be the case that citizens could choose less disruptive ways of pursuing the ends set by the virtues of good citizenship. For instance, campaigning on behalf of neglected issues and concerns might be better pursued through established institutions, such as political parties, rather than publicity generating campaigns of civil disobedience.

Civil disobedience as deliberative contestation speaks to these issues by encouraging citizens to ensure that their beliefs are reasonable (above, pp. 98-105), encouraging citizens to be sensitive to the context of their grievance (above, pp. 239-241), and encouraging citizens to explain why non-institutional forms of direct action are a justified means of publicising their concerns (above, pp. 190-191). In particular, it was noted above that citizens generally deliberate with other citizens before embarking on civil disobedience (pp. 102-103). This deliberation includes an elaboration of their grounds for complaint, and discussion of how best to present their beliefs to the wider democratic community. It also includes an analysis of strategy, and a discussion of whether civil disobedience is the most appropriate means to pursue their goals. Such deliberation allows an opportunity for citizens to reflect on the wisdom and efficacy of engaging in civil disobedience. It provides an opportunity to judge

whether or not civil disobedience would be the best way of advancing a particular cause or concern.¹¹

In summary: a disposition to engage in principled and non-violent acts of civil disobedience can be defended as part of a wider conception of democratic citizenship. It is one way in which persons can act as good citizens. In fact, given the personal risks that such citizens take – for instance the risk of arrest and punishment– this disposition can be defended as a particularly courageous manifestation of civility and civic virtue. Civilly disobedient citizens go beyond what is normally expected of good citizens, and accrue potentially high personal costs in order to defend the principles of rights and democracy that underlie their society.

Conclusion: Deliberative contestation – The full picture

In conclusion I want to summarise the main features of the deliberative contestation account of civil disobedience in a constitutional democracy. This constitutes a concise and definitive statement of the theory as it has developed over the course of the last five chapters.

The deliberative contestation account of civil disobedience offers a normative framework to assess and justify the use of public, principled and illegal political

¹¹ An example of this kind of judgement is the statement of the United Students Against Sweatshops explaining the cancellation of planned protests after the terrorist attacks of September 11, 2001: '[now is] neither the time nor the place to gather in opposition' (Featherstone, 2002: 103).

protest within a constitutional democracy. Civil disobedience is understood as a means by which citizens can contest aspects of law and policy, and contribute to ongoing democratic deliberation about the direction of law and policy. The theory states that civil disobedience is potentially justified when protesters reasonably believe that laws or policies: (a) violate their rights or the rights of others, (b) should recognise new basic rights in the light of new problem situations and concerns, and (c) violate principles of inclusive, unbiased and informed democratic deliberation. Civil disobedience is especially justified in these circumstances, because unless law and policy is in sufficient harmony with public political principles, our ordinary moral reasons to comply with the law are weakened.

As additions to the above requirement, the deliberative contestation account makes it a necessary condition of justified civil disobedience that it avoids hurt and injury to others, and stipulates various contextual factors that might augment a principled justification for civil disobedience and thus make that justification stronger. Both these additions are consistent with the idea of democracy which informs the deliberative contestation account: to hurt and injure is inconsistent with the idea of public deliberation geared towards dialogue not coercion, and relevant contexts that support the decision to engage in civil disobedience are those that impact upon the general justice of society or the general health of deliberative politics. These two additions were elaborated through reflecting on an influential justification of civil disobedience offered in the public sphere of American society.

Appendix I. Breakdown of argument

Introduction: Civil disobedience in a constitutional democracy

Main question of the essay: when, if ever, do acts of civil disobedience – principled but illegal acts of political protest – become politically justified in a constitutional democracy?

I. The relevance of this essay

1. Civil disobedience has become an under-theorised topic since the 1960s and 1970s, when campaigns by the civil rights and anti-war movements encouraged political and legal philosophers to explore the theory and practice of different forms of political protest.
2. Its neglect is unfortunate since civil disobedience is still a feature of contemporary politics, with recent protest campaigns by new social movements and the anti-capitalist movement raising questions about the nature, role and justification of civil disobedience.
3. Its neglect is also unfortunate as recent developments/renewals in political philosophy – such as deliberative democracy and civic republicanism – might be helpful in shedding new light on the old problem of civil disobedience.

II. Some preliminary considerations

1. In this essay I understand civil disobedience as a public and illegal act of political protest by an individual or group signalling opposition to government law or policy.
2. The investigation is limited to the justification of civil disobedience within a constitutional democracy, and does not consider civil disobedience in non-democratic states.
3. The investigation assumes that there are general reasons for compliance with the law in constitutional democracies, but does not commit itself to the claim that there is a duty or obligation to obey the law.

4. The essay is concerned primarily with political justification – justifying one's actions to other members of the democratic community – and not with legal justification.

III. A note on method

1. Broadly speaking, the essay follows a method of reflective equilibrium whereby we aim to achieve a fit between considered convictions about civil disobedience and theoretical principles about justified civil disobedience.
2. It follows this method because (i) reflective equilibrium strengthens both considered convictions and theoretical ideas – by showing them to be mutually supportive and (ii) reflective equilibrium enables political theory to retain a mooring in political practice.

Chapter 1 John Rawls and the liberal theory of civil disobedience

Aim of chapter: To introduce the guiding theme of the thesis – that the best justifications for civil disobedience in a constitutional democracy are gleaned from the public political principles that justify political power – through a critique of John Rawls' 'constitutional' theory of civil disobedience.

1. I. Civil disobedience and public political principles

1. Description of Rawls' theory of civil disobedience: civil disobedience is justified when government law or policy clearly and substantially violate the equal liberty principle and the principle of fair equality of opportunity.
2. Defence of Rawls' method of justification: it provides a public justification of civil disobedience, which can be accepted as reasonable by other citizens. Civil disobedience is justified when fair terms of social co-operation – which all members of society accept – are violated.
3. Defence of relevance of Rawls' theory for real world discussions: uses public political principles that are elaborated from fundamental ideas in public political culture of constitutional democracies & speaks to actual campaigns carried out in U.S. during 1950s and 1960s.

1. II. Civil disobedience and the constitutional testing of the law

1. Rawls' theory fails to adequately distinguish between justified civil disobedience and constitutional testing of laws. This is because clearly and substantially unjust laws can reasonably be regarded as unconstitutional by citizens in a nearly just state, at least where the equal liberty principle and fair equality of opportunity principle have constitutional standing.
2. This is significant because it challenges the perception that civil disobedience constitutes illegal disobedience to political authority – citizens engaged in civil disobedience might deny that they are violating the law.
3. This apparent paradox can be alleviated by allowing indirect civil disobedience, and by allowing civil disobedience aimed at creating new basic liberties not recognised by Rawls' theory or constitutional law.

1. III. Civil disobedience and the democratic character of the law

1. Some critics of Rawls' theory share his method of constructing justifications for civil disobedience – turning moral reasons to comply with the law against the law – but charge Rawls with neglecting the importance of democratic reasons to obey, and sometimes disobey, the law.
2. Rawls' theory of justice does contain normative resources to respond to this criticism. In particular he has an account of the fair value of political liberty that can be employed as a justification for civil disobedience in the face of inequalities in political power.
3. Rawls' theory of civil disobedience should explore this possibility not just because its account of the fair value of political liberty encourages it to, but also because doing so enables it to retain its relevance to contemporary real world debates about civil disobedience.

Chapter 2 Civil disobedience as a campaign for new basic rights

Aim of chapter: To amend Rawls' justification of civil disobedience so that it allows for campaigns geared towards the promotion of new basic rights, and respond to potential objections to rights based civil disobedience.

2. I. Civil disobedience and the dynamic nature of basic rights

1. Description of the dynamic character of basic rights: sometimes changing situations and contexts lead to calls for political and legal acknowledgement of new basic rights. Civil disobedience can play a role in the process of campaigning for these new basic rights.
2. An example of this is the emergence of person-centred environmental rights, and the role civil disobedience campaigns have played and are continuing to play in this process.
3. Civil disobedience as a campaign for new rights can be defended as: (i) an attractive normative account of civil disobedience, because it illustrates how principled acts of protest can help extend and develop a society's conception of justice and its system of rights, and (ii) a way of marking a clearer distinction between justified civil disobedience and constitutional testing,

2. II. Civil disobedience and reasonable belief

Objection: saying that civil disobedience is justified when citizens believe rights are violated or new rights should be acknowledged allows people with crazy or uninformed beliefs about rights to disobey.

Answer: beliefs of protesters must be reasonable, which means that they must respect basic norms of common sense and logic, be backed up with second-order beliefs about rights, and be presented in a reasonable manner and subject to potential revision.

2. III. Civil disobedience and the stability of a constitutional democracy

Objection: civil disobedience as a response to rights violations and a campaign for new rights allows so much leeway to disobey that the stability of a constitutional democracy may be undermined.

Answer 1: the theory does allow a lot of leeway to disobey, but in ordinary circumstances this will not necessarily lead to instability. This is because civil disobedience is a self-limiting form of protest – in a constitutional democracy it should be non-violent, persuasive, and subject to legal punishment.

2. I. Civil disobedience and the dynamic nature of basic rights

1. Description of the dynamic character of basic rights: sometimes changing situations and contexts lead to calls for political and legal acknowledgement of new basic rights. Civil disobedience can play a role in the process of campaigning for these new basic rights.
2. An example of this is the emergence of person-centred environmental rights, and the role civil disobedience campaigns have played and are continuing to play in this process.
3. Civil disobedience as a campaign for new rights can be defended as: (i) an attractive normative account of civil disobedience, because it illustrates how principled acts of protest can help extend and develop a society's conception of justice and its system of rights, and (ii) a way of marking a clearer distinction between justified civil disobedience and constitutional testing.

2. II. Civil disobedience and reasonable belief

Objection: saying that civil disobedience is justified when citizens believe rights are violated or new rights should be acknowledged allows people with crazy or uninformed beliefs about rights to disobey.

Answer: beliefs of protesters must be reasonable, which means that they must respect basic norms of common sense and logic, be backed up with second-order beliefs about rights, and be presented in a reasonable manner and subject to potential revision.

2. III. Civil disobedience and the stability of a constitutional democracy

Objection: civil disobedience as a response to rights violations and a campaign for new rights allows so much leeway to disobey that the stability of a constitutional democracy may be undermined.

Answer 1: the theory does allow a lot of leeway to disobey, but in ordinary circumstances this will not necessarily lead to instability. This is because civil disobedience is a self-limiting form of protest – in a constitutional democracy it should be non-violent, persuasive, and subject to legal punishment.

Answer 2: the theory does allow a lot of leeway to disobey, and in some extraordinary circumstances this might lead to instability. But in these circumstances it is not immediately apparent that stability should be preferred over protecting or developing the society's conception of justice.

2. IV. Civil disobedience and free riding by the insincere protester

Objection: civil disobedience as a response to rights violation and a campaign for new basic rights encourages protesters to shroud their real reasons for disobedience behind a bogus rights claim.

Answer 1: civil disobedience is not a low cost exercise, because of the threat of punishment.

Answer 2: the wider democratic community is a resource for smoking out bogus claims in the political public sphere.

Chapter 3: Jürgen Habermas and the democratic theory of civil disobedience

Aim of chapter: To pursue the second criticism of Rawls' theory – that it lacks an account of the democratic reasons citizens might have for engaging in civil disobedience – by examining the work of Jürgen Habermas.

3. I. Habermas on deliberative democracy and civil disobedience

1. According to Habermas, deliberative democracy is geared towards the generation of rational political decisions in accordance with constitutional principles.
2. Habermas defends a two track model of deliberative democracy: a formal-institutional sphere comprising various political institutions engaged in will formation, and an informal-non-institutional sphere comprising various associations of civil society engaged in opinion formation.
3. Civil disobedience is a means for concerned citizens and social movements to publicise views and concerns with the intention of stimulating widespread processes of opinion formation throughout civil society, and influencing processes of will formation in formal political institutions.

3. II. Habermas on the justification of civil disobedience

1. Habermas offers two different answers to the question of how civilly disobedient citizens go about offering justifications for their actions.
2. On the one hand civil disobedience is sometimes justified because it is *compatible* with constitutional principles, facilitating ongoing public deliberation. On the other hand civil disobedience is sometimes justified as a response to *violations* of constitutional principles, understood as basic rights.
3. Neither account is satisfactory: the expansive account makes civil disobedience too easy to justify – civil disobedience is *always* an attempt to contribute to deliberation – and the restrictive account makes civil disobedience too difficult to justify – civil disobedience would only be justified as a response to rights violations.

3. III. Towards a deliberative democratic theory of civil disobedience

1. Cohen and Arato propose a Habermasian inspired account of the democratic justification of civil disobedience, based on maintaining healthy channels of communication between state and civil society.
2. Cohen and Arato's account lacks a robust account of the justification of civil disobedience: they do not say what kinds of democratic inadequacies create the conditions for justified civil disobedience. In this sense it is like the expansive interpretation of Habermas' theory.
3. Missing from both Habermas' and Cohen and Arato's theory is an account of the kinds of democratic inadequacies that might justify civil disobedience. Habermas' writings are a useful resource for suggesting what these conditions might be. Civil disobedience might be justified when democratic deliberation has been distorted through illegitimate power, or when democratic deliberation has been insufficiently informed.

Chapter 4: Democracy, deliberation and disobedience

Aim of chapter: to develop a robust account of when civil disobedience might be justifiable within a deliberative democracy. The method is to suggest some

fundamental principles shared by a family of deliberative democratic conceptions, and explore tendencies in actual deliberation that might frustrate the realisation of these principles to the point where civil disobedience becomes potentially justifiable.

4. I. The principles of a deliberative republic

1. Public deliberation should include all members of the relevant political community. This means that those governed by the political authority must be included as legislators, and that the interests of non-members affected by outcomes should be acknowledged in deliberation.
2. Citizens must publicly deliberate with one another on the basis of their sincere and reasonable beliefs to decide law and policy over matters of common concern. This entails a conception of democratic citizenship prioritising persuasion, reason giving, and common interests, and background conditions ensuring deliberation is maximally free from distorting effects of power inequalities.
3. Processes of public deliberation within decision-making bodies should be receptive to and channel all the data and arguments necessary to make adequately informed political decisions.

4. II. Civil disobedience as deliberative contestation

Civil disobedience is *deliberative* in that it is geared towards contributing to ongoing public deliberation at all levels of society. Civil disobedience is *contestation* in that it constitutes a challenge to perceived failings in existing deliberative politics. Circumstances where deliberative contestation sanctions civil disobedience are when deliberative principles are seriously violated:

1. When a person/group governed by deliberative institutions is formally excluded from ongoing deliberation, or when the interests of seriously affected persons have been neglected within deliberative procedures and by deliberative outcomes.
2. When a powerful interest has been able to distort or bias either deliberation itself or the outcome of deliberation in its favour.

3. When tendencies are at work to frustrate the proper circulation of relevant information and concerns in processes of public deliberation, particularly when this is partially the result of deep-seated attitudes and assumptions.

4. III. Public reason as a constraint on civil disobedience

1. Some accounts of deliberative democracy defend a conception of public reason that would prohibit citizens from advancing political claims derived from a comprehensive conception of ethics or morality.
2. Civil disobedience as deliberative contestation draws on similar ideas, by claiming that citizens should not justify civil disobedience through referring to their own religious or moral convictions, but through referring to public political principles.
3. As a further condition of justified civil disobedience, deliberative contestation can also insist that in the course of their protest groups should not introduce ideas that, if translated into public policy, would result in violations of public political principles. However, this should not be translated as a *complete* prohibition on civilly disobedient citizens referring to ideas drawn from their own comprehensive doctrines.

Chapter 5: Deliberative Contestation and the Civil Rights Movement

Aims of chapter: (i) to demonstrate that civil disobedience as deliberative contestation offers a plausible set of normative prescription by displaying its compatibility with a prominent actual campaign of civil disobedience – that carried out by the civil rights movement; (ii) to reform and develop civil disobedience as deliberative contestation in the light of salient issues raised through reflecting on Martin Luther King's justification of civil disobedience in 'Letter from Birmingham City Jail'.

5. I. Why look at actual cases of civil disobedience?

1. To explore whether or not deliberative contestation recommends justifications for civil disobedience that are likely to be: (i) employed by citizens who engage in civil disobedience within constitutional democracies

and (ii) accepted as reasonable by other members of the democratic community.

2. To investigate the potential for revising the theory in the light of relevant ideas about civil disobedience expressed by actors within the public spheres of constitutional democracies.

5.II. Deliberative contestation and the Civil Rights Movement (1): The plausibility of the theory

1. Civil disobedience as deliberative contestation resonates with the reasons King and his followers engaged in civil disobedience: both emphasise rights, democracy and deliberation.
2. Civil disobedience as deliberative contestation resonates less with the reactions of the wider democratic community to the civil rights movement, which was generally hostile to their use of civil disobedience. However, the post-hoc acceptance and celebration of the movement suggests that civil disobedience campaigns can, over time, legitimise themselves through the arguments and justifications of their members.
3. The comparison between deliberative contestation and the civil rights movement suggests that the former offers a reasonably plausible account of the justification of civil disobedience in constitutional democracies, though there may be serious obstacles to its normative prescriptions gaining widespread acceptance.

5. III. Deliberative Contestation and the Civil Rights Movement (2): Reforming the theory

1. Investigating actual justifications of civil disobedience offered within constitutional democracies can be an opportunity for critical reflection on an existing theory, and exploring whether or not it can and should be reformed to incorporate relevant issues and concerns.
2. King's justification of civil disobedience refers both to the *context* of the campaign and the *conduct* of the campaign. The context of the campaign was endemic racism throughout U.S. society, not just unjust laws and policies.

The conduct of the campaign was marked by a studious and principled commitment to non-violent methods.

3. Civil disobedience as deliberative contestation can incorporate concerns about conduct and context. It adds as a necessary condition of justification that civil disobedience avoids, as far as possible, hurt or injury to others, in order that norms of deliberation are respected. It adds as a further dimension of justification the idea that contextual variables – such as those relating to the overall justice of the regime and health of its deliberative practices – might augment and strengthen a justification of civil disobedience.

Concluding Remarks: Civil disobedience and democratic citizenship

Aim of conclusion: To show how the account of civil disobedience developed above coheres with broader conceptions of democratic citizenship. In particular, the conclusion explores how a disposition to engage in civil disobedience as deliberative contestation can form part of a liberal or republican conception of democratic citizenship. The aim here is to supplement civil disobedience as deliberative contestation and bring out another dimension of civil disobedience in a constitutional democracy.

I. Democratic citizenship from a liberal and republican perspective

1. Recent political theorists have inquired whether and to what extent stable and just societies require not merely just institutions but also a civilly motivated democratic citizenry.
2. Two examples are William Galston and Philip Pettit, who elaborate a conception of democratic citizenship from a liberal and republican perspective respectively.
3. Both accounts emphasise the need for citizens to recognise and be motivated by the political principles that underlie their society – this offers a link between a liberal/republican conception of democratic citizenship and civil disobedience.

II. Civil disobedience and the virtues of democratic citizenship

1. Engaging in civil disobedience as deliberative contestation can be seen as one of the ways in which citizens can pursue the virtues of democratic citizenship.

2. In particular, it is one way in which citizens can (a) display loyalty to the principles that regulate their society, (b) close the gap between principle and practice, (c) defend the interests of neglected groups, and (d) promote the common interest of the society.

Appendix II: Civil disobedience and cosmopolitan citizenship

The preceding discussion has for the most part focused on the justification of civil disobedience within a bounded political community. One of the consequences of this focus is that the potentially international dimension of civil disobedience has been downplayed. Whilst a thorough treatment of this dimension is beyond the scope of this essay, in this appendix I want to briefly discuss how civilly disobedient citizens might defend their actions by referring to notions of *cosmopolitan* politics and *cosmopolitan* citizenship. Such a discussion can serve as a rough indication of how the deliberative contestation theory might be developed in ways that make it more relevant to issues of international and cosmopolitan politics. What I have to say here is brief and speculative, and is set down primarily as a marker for future investigation and analysis.

The relevance of global or cosmopolitan politics to the topic of civil disobedience can be highlighted through referring to theoretical and political developments. Political and social theorists have become increasingly interested in the subject of cosmopolitan justice and democracy, and the possibilities for theorising new conceptions of citizenship and cross-national institutions (Archibugi, 2003; Brown, 2002). Some writers have focused on the need to universalise principles of rights and distributive justice, so that justice prevails between as well as within nation-states (Pogge, 1989; Barry, 1989). Other writers have focused on the necessity of reforming existing international institutions so that they demonstrate greater democratic legitimacy than at

present, and/or the necessity of developing new cosmopolitan democratic institutions and communities (Archibugi, 1995; Held, 1995, Habermas, 2002). Other writers have focused on the emergence of a global civil society, comprised of transnational associations and networks, and have discussed the role such an enlarged civil society can play in promoting and entrenching cosmopolitan norms (Kaldor, 2003; Keane, 2001). What links these developments is a questioning of the nation-state – not necessarily a questioning of its continuing relevance or survival, but a questioning of its capacity to realise and protect the principles of rights and democracy upon which its legitimacy rests.

The increasing theoretical interest in cosmopolitanism has coincided with the emergence of a kind of global advocacy and protest culture (Scholte, 2000: 277-280; Kaldor, 2003: 78-108). Associations and protest networks that belong to this culture are global in two senses. Firstly, they are global in terms of their organisational structure and choice of strategies. Members of these groups often have multinational backgrounds, and maintain informal links with a range of other multinational associations and networks. Their strategy is not merely to lobby their own governments, but also to lobby other nation-states and transnational institutions, and to reach a global audience to publicise their concerns (Keck and Sikkink, 1998). Secondly, they are global in that they often campaign around issues of global concern – issues that have implications for a global citizenry and which often demand a co-ordinated response from a number of nation-states. Examples of these concerns are: human rights abuses committed by particular nation-states, the increasing independence of global

economic forces from political control at the nation-state level, global environmental damage, global poverty, access to medical treatment for the world's poor, and security challenges posed by global terrorist networks and the proliferation of chemical and nuclear weapons. The agenda of this global advocacy and protest culture might reasonably be described as 'cosmopolitan' because of its concern to highlight problems that confront an international community of citizens, rather than problems that only confront the populations of particular nation-states (Cohen and Rai, 2000).

Many of the concerns publicised by these movements cohere with the concerns of theorists working on issues of global justice, democracy or civil society. For instance, campaigns to cancel Third World debt or to increase aid for developing countries resonate with liberal egalitarians like Pogge and Barry, who articulate principles of international distributive justice. Campaigns to make international institutions such as the World Bank more transparent and accountable, or campaigns to reign in the power of global corporate interests, resonate with the concerns of democratic theorists like Habermas and Held, who advocate greater democratic control over the global economy and the reform of existing institutions.

These developments become significant for discussions of civil disobedience insofar as global advocacy networks engage in illegal political protest to publicise their concerns. This is not merely a theoretical possibility, but an increasingly common feature of contemporary political protest. In chapter 4, I

discussed the recent campaign carried out by U.S. students against sweatshop labour (above, pp. 182-184). The agenda of this campaign seems to be motivated by a cosmopolitan concern for the interests of non-nationals, and a desire to publicise the need for global regulation of labour conditions. Another recent example was an 'occupation' of the Millennium Wheel in London in October 1999, in order to publicise environmental damage and threats to local populations caused by dam projects in the Basque Country and India.¹ In this case, protesters in one country were appealing to a global audience in order to publicise threats faced by persons on the other side of the world. More generally, the agenda of the so-called 'anti-capitalist' movement incorporates concern for what Jan Aart Scholte calls 'supraterritorial issues' such as 'transworld ecological change' or 'transborder capitalism' (Scholte, 2000: 277). The movement has spearheaded the recent upsurge in direct action tactics such as street demonstrations and civil disobedience (Kaldor, 2002: 101-104).

Contemporary patterns of political protest do, then, suggest that civilly disobedient citizens can be motivated by cosmopolitan considerations. Protesters will not just protest violations of rights or democratic inadequacies in their own nations, but also want to publicise a global agenda. Can these 'cosmopolitan' protests be included within the framework of justification established through civil disobedience as deliberative contestation? Moreover, can a disposition to engage in cosmopolitan civil disobedience be incorporated into a wider conception of cosmopolitan citizenship, in a similar fashion to the way in which I

¹ See: <http://flag.blackened.net/global/armillwheel.htm>

suggested a disposition to engage in civil disobedience could be incorporated into a conception of democratic citizenship?

These two questions require more detailed responses that I can offer here. In terms of the first question, I think that one of the advantages of civil disobedience as deliberative contestation is that its vocabulary is not too far removed from some of the concerns and issues addressed by cosmopolitan protesters. In particular, the agenda of the global protest culture discussed above often involves an appeal to a genuinely universal rights-discourse and demands for an extension of democratic principles to international relations and politics. Campaigns might be geared towards publicising serious human rights violations carried out in other nations, in order that some kind of action is taken against offending nations (Baxi, 2000). Alternatively, campaigns against global poverty and for widespread availability of medical resources might be reasonably expressed in terms of promoting economic or welfare rights for a global citizenry (Held, 1995: 278-283). Campaigns against the imposition of neo-liberal economic policies on developing countries appeal to democratic intuitions about the unfairness of imposing policies on peoples who are not in a position to engage in meaningful deliberation, or to contest policy outcomes (Stiglitz, 2002: 9, 96).

Civil disobedience as deliberative contestation endorses protest carried out when deliberation in bounded political communities neglects the interests of non-members who are seriously affected by that community's decisions (chapter 4,

section II). This illustrates one way in which a form of 'cosmopolitan concern' can figure in justifications of civil disobedience within a constitutional democracy. There are at least some grounds for hoping that further reflection will elaborate more detailed ways in which civil disobedience as deliberative contestation could speak to the concerns of the new global protest culture, without losing or diluting its focus on rights or deliberative democratic principles.

In terms of the second question, all things considered it seems feasible to suggest that a disposition to engage in cosmopolitan civil disobedience can cohere with a broader conception of cosmopolitan citizenship. At present there are few accounts of cosmopolitan citizenship, and even fewer accounts of the necessary virtues of cosmopolitan citizenship. Andrew Linklater has developed one account. According to Linklater, cosmopolitan citizens should promote the social and economic conditions that facilitate opportunities for participation within democratic politics for the widest range of the world's population (Linklater, 1998: 205-206). This might involve promoting a range of equal civil, political and social rights for all global citizens, and supporting the development of meaningfully democratic and inclusive global institutions. Just like the liberal-republican account of citizenship discussed above, this notion of cosmopolitan citizenship demands that citizens be actively motivated by a concern for the political principles that comprise the cosmopolitan project. A disposition to engage in civil disobedience to promote cosmopolitan norms of universal rights and greater democracy might be defended as a way for citizens

to demonstrate their loyalty to cosmopolitan principles, and as a way for citizens to close the (huge) gap between principle and practice in the global arena.²

Whilst more work needs doing here, it does seem that civil disobedience as deliberative contestation has some potential to resonate with 'cosmopolitan' protests. This perhaps reflects the continuing political saliency of rights and democracy as ideals that galvanise citizens to engage in personally risky acts of political protest. Just as citizens may be motivated to disobey the law in order to promote these ideals in a national context, they may also be willing to do so in order to promote these ideals in an international context. Given the purported claim to universality of these ideals, and the proven difficulty of achieving anything like universal recognition and protections of these ideals, this may well be a disposition of cosmopolitan citizenship of incalculable value to the cosmopolitan project.

² One difficulty with this suggestion is the possible conflicts that might emerge between loyalties to cosmopolitan principles and ideals, and loyalties to national principles and ideals. Cosmopolitan loyalties might pull citizens in one direction, whereas national loyalties might pull them in another. A fuller account of civil disobedience and cosmopolitan citizenship would need to address these potential conflicts.

References and Bibliography

Listed are all references introduced in the text, as well as some sources that are not directly referenced but which had some influence on the formation and development of the thesis.

Allan, T. R. S. (1996) 'Citizenship and Obligation: Civil Disobedience and Civil Dissent', *Cambridge Law Journal*, 55:1, 89-121.

Archibugi, Danielle (1995) 'From the United Nations to Cosmopolitan Democracy', in Archibugi, Danielle and Held, David (eds.) *Cosmopolitan Democracy: an Agenda for a New World Order*, Polity Press: Cambridge.

Archibugi, Danielle (ed.) (2003) *Debating Cosmopolitics*, London: Verso.

Arendt, Hannah (1969) *Crises of the Republic*, New York: Harcourt Brace & Company.

Arntzen, Sven (1996) 'Kant on Duty to Oneself and Resistance to Political Authority', *Journal of the History of Philosophy*, 34:3, 409-424.

Barry, Brian (1973) *The Liberal Theory of Justice: A Critical Examination of the Principal Doctrines in 'A Theory of Justice' by John Rawls*, Oxford: Clarendon Press.

Barry, Brian (1989) 'Humanity and Justice in Global Perspective', in Barry, Brian *Democracy, Power and Justice: Essays in Political Theory*, Oxford: Oxford University Press.

Barry, Brian (1995) *Justice as Impartiality*, Oxford: Clarendon Press.

Barry, Brian (2001) *Culture and Equality: An Egalitarian Critique of Multiculturalism*, Oxford: Polity.

Baxi, Upendra (2000) 'Human Rights: Suffering Between Movements and Markets', in Robin Cohen and Shirin M. Rai, (eds.) *Global Social Movements*, London: Athlone Press.

Bay, Christian and Walker, Charles (1975) *Civil Disobedience: Theory and Practice*, Montréal: Black Rose Books.

Bedau, Hugo Adam (ed.) (1969) *Civil Disobedience*, New York: Pegasus.

Bedau, Hugo Adam (ed.) (1991) *Civil Disobedience in Focus*, London: Routledge.

Bengoetxea, Joxerramon and Ugartemendia, Juan Ignacio (1997) 'Civil disobedience as constitutional patriotism', *Legal Studies*, 17:3, 434-447.

Benhabib, Seyla (2002) *The Claims of Culture: Equality and Diversity in the Global Era*, Oxford: Princeton University Press.

Betz, Joseph (1970) 'Can Civil Disobedience be Justified?' *Social Theory and Practice*, 1:2, 13-30.

Black, Charles L. (1965) 'The Problem of the Compatibility of Civil Disobedience with American Institutions of Government' *Texas Law Review*, 43:4, 492-506.

Black, Virginia (1970) 'The Two Faces of Civil Disobedience', *Social Theory and Practice*, 1:1, 17-25.

Bohman, James (1996) *Public Deliberation: Pluralism, Complexity and Democracy*, London: The MIT Press.

Bohman, James (1997) 'Deliberative Democracy and effective Social Freedom: Capabilities, Resources, and Opportunities', in Bohman, James and Rehg, William (eds.) *Deliberative Democracy: Essays on Reason and Politics*, London: The MIT Press.

Bohman, James and Rehg, William (eds.) (1997) *Deliberative Democracy: Essays on Reason and Politics*, London: The MIT Press.

Bohman, James (1998) 'Survey Article: The Coming of Age of Deliberative Democracy' *The Journal of Political Philosophy*, 6:4, 400-425.

Borradori, Giovanna (2003) *Philosophy in a Time of Terror: Dialogues with Jürgen Habermas and Jacques Derrida*, London: The University of Chicago Press.

Bowles, Samuel and Gintis, Herbert (1986) *Democracy and Capitalism: Property, Community, and the Contradictions Modern Social Thought*, London: Routledge.

Boyle, Alan E. and Anderson, Michael R. (eds.) (1996) *Human Rights Approaches to Environmental Protection*, Oxford: Clarendon Press.

Brown, Chris (2002) *Sovereignty, Rights and Justice: International Political Theory Today*, Oxford: Polity.

Brown Jr., Stuart M. (1961) 'Civil Disobedience' *The Journal of Philosophy*, 58:22, 669-681.

Callinicos, Alex (2003) *An Anti-Capitalist Manifesto*, Oxford: Polity.

- Carter, Stephen L. (1998) *The Dissent of the Governed: A Meditation on Law, Religion, and Loyalty*, London: Harvard University Press.
- Cavallaro, James L. (1993), 'The Demise of the Political Necessity Defence: Indirect Civil Disobedience and *United States v. Schoon*', *California Law Review*, 81:2, 351-385.
- Christiano, Thomas (1997), 'The Significance of Public Deliberation', in Bohman, James and Rehg, William (eds.) *Deliberative Democracy: Essays on Reason and Politics*, London: The MIT Press.
- Cohen, Carl (1966), 'Civil Disobedience and the Law', *Rutgers Law Review*, 21:1, 1-17.
- Cohen, G. A. (2000) *If You're an Egalitarian, How Come You're So Rich?* London: Harvard University Press.
- Cohen, Jean L. and Arato, Andrew (1992) *Civil Society and Political Theory*, London: The MIT Press
- Cohen, Joshua (1986) 'An Epistemic Conception of Democracy', *Ethics*, 97:1, 26-38.
- Cohen, Joshua (1989) 'Democratic Equality', *Ethics*, 99:4, 727-751.
- Cohen, Joshua (1995) 'Review of *Inequality Reexamined* by Amartya Sen', *The Journal of Philosophy*, 92:5, 275-288.
- Cohen, Joshua (1997a) 'Deliberation and Democratic Legitimacy' in Bohman, James and Rehg, William (eds.) *Deliberative Democracy: Essays on Reason and Politics*, London: The MIT Press.
- Cohen, Joshua (1997b) 'Procedure and Substance in Deliberative Democracy' in Bohman, James and Rehg, William (eds.) *Deliberative Democracy: Essays on Reason and Politics*, London: The MIT Press.
- Cohen, Joshua (1999) 'Reflections on Habermas on Democracy', *Ratio Juris*, 12:4, 385-416.
- Cohen, Robin and Rai, Shirin M. (eds.) (2000) *Global Social Movements*, London, Athlone Press.
- Cook, Robert (1998) *Sweet Land of Liberty? The African-American Struggle for Civil Rights in the Twentieth Century*, London: Longman.
- Crossley, Nick (2002) *Making Sense of Social Movements*, Open University Press: Buckingham.

- Daniels, Norman (ed.) (1975a) *Reading Rawls: Critical Studies on Rawls' 'A Theory of Justice'*, Stanford: Stanford University Press.
- Daniels, Norman (1975b) 'Equal Liberty and Unequal Worth of Liberty', in Daniels, N. (ed.) *Reading Rawls: Critical Studies on Rawls' 'A Theory of Justice'*, Stanford: Stanford University Press.
- Daniels, Norman (1979) 'Wide Reflective Equilibrium and Theory Acceptance in Ethics', *Journal of Philosophy*, 96:5, 256-282.
- Daniels, Norman (1980) 'Reflective Equilibrium and Archimedean Points', *Canadian Journal of Philosophy*, X:1, 83-103.
- Dewer, John, Paliwala, Abdul, Picciotto, Sol and Ruete, Matthias (eds.) (1986) *Nuclear Weapons, The Peace Movement and the Law*, London: Macmillan.
- Dreben, Burton (2003) 'On Rawls and Political Liberalism', in Freeman, Samuel (ed.) *The Cambridge Companion to Rawls*, Cambridge: Cambridge University Press.
- Dryzek, John S. (1997) *The Politics of the Earth: Environmental Discourses*, Oxford: Oxford University Press.
- Dryzek, John S. (2000) *Deliberative Democracy and Beyond*, Oxford: Oxford University Press.
- Duncombe, Stephen (2002) 'Stepping off the Sidewalk: Reclaim the Streets/NYC' in Shepard, Benjamin and Hayduk, Ronald (eds.) *From ACT UP to the WTO: Urban Protest and Community Building in the Era of Globalization*, London: Verso.
- Dworkin, Ronald (1978) *Taking Rights Seriously: New Impression with Reply to Critics*, London: Duckworth.
- Dworkin, Ronald (1985) *A Matter of Principle*, London: Harvard University Press.
- Dworkin, Ronald (1986) *Law's Empire*, Oxford: Hart.
- Dworkin, Ronald (1996) *Freedom's Law: The Moral Reading of the American Constitution*, Oxford: Oxford University Press.
- Dworkin, Ronald (2000) *Sovereign Virtue: The Theory and Practice of Equality*, London: Harvard University Press.
- Elliot, Robert (1995) 'Introduction', in Elliot, Robert (ed.) *Environmental Ethics*, Oxford: Oxford University Press.

Elster, Jon (1986) 'The Market and the Forum: Three Varieties of Political Theory', in Elster, Jon and Hylland, Aanund (eds.) *Foundations of Social Choice Theory*, Cambridge: Cambridge University Press.

Elster, Jon (1998a) 'Deliberation and Constitution Making', in Elster, Jon (ed.) *Deliberative Democracy*, Cambridge: Cambridge University Press.

Elster, Jon (ed.) (1998b) *Deliberative Democracy*, Cambridge: Cambridge University Press.

Epstein, Barbara (2002) 'The Politics of Prefigurative Community' in Duncombe, Stephen (ed.) *Cultural Resistance Reader*, London: Verso.

Estlund, David (1997) 'Beyond Fairness and Deliberation: The Epistemic Dimension of Democratic Authority', in Bohman, James and Rehg, William (eds.) *Deliberative Democracy: Essays on Reason and Politics*, London: The MIT Press.

Featherstone, Liza and United Students Against Sweatshops (2002) *Students Against Sweatshops*, London: Verso.

Ferguson, Adam (1995) *An Essay on the History of Civil Society*, edited by Fania Oz-Salzberger, Cambridge: Cambridge University Press.

Fine, Robert (2002) *Political Investigations: Hegel, Marx, Arendt*, London: Routledge.

Fine, Robert and Smith, William (2003) 'Jurgen Habermas' theory of cosmopolitanism', *Constellations*, forthcoming.

Finnis, John (1999) 'Natural Law and the Ethics of Discourse' *Ration Juris*, 12:4, 354-373.

Fishkin, James S. and Laslett, Peter (eds.) (2003) *Debating Deliberative Democracy*, London: Blackwell.

Fiss, Owen (1998) *The Irony of Free Speech*, Harvard University Press: London.

Fraser, Nancy (1997) *Justice Interruptus: Critical Reflections on the "Postsocialist" Condition*, London: Routledge.

Frazier, Clyde (1972) 'Between Obedience and Revolution' *Philosophy and Public Affairs*, 1:3, 315-334.

Freeman, Samuel (2000) 'Deliberative Democracy: A Sympathetic Comment', *Philosophy and Public Affairs*, 29:4, 371-418.

Freeman, Samuel (ed.) (2003) *The Cambridge Companion to Rawls*, Cambridge: Cambridge University Press.

Galston, William A. (1991) *Liberal Purposes: Goods, Virtues & Diversity in the Liberal State*, Cambridge: Cambridge University Press.

Gandhi, Mahatma (1987) *The Moral and Political Writings of Mahatma Gandhi Volume III: Non-Violent Resistance and Social Transformation*, (edited by Raghavan Iyer), Oxford: Clarendon Press.

Gills, Barry K. (2000) *Globalization and the Politics of Resistance*, Hampshire: Palgrave.

Greenawalt, Kent (1989) *Conflicts of Law and Morality*, Oxford: Oxford University Press.

Gutmann, Amy and Thompson, Dennis (1996) *Democracy and Disagreement*, London: Harvard University Press.

Gutmann, Amy and Thompson, Dennis (2002) 'Deliberative Democracy Beyond Process' *The Journal of Political Philosophy*, 10:2, 153-174.

Gutmann, Amy (2003) 'Rawls on the Relationship between Liberalism and Democracy', in Freeman, Samuel (ed.) *The Cambridge Companion to Rawls*, Cambridge: Cambridge University Press.

Habermas, Jürgen (1985) 'Civil Disobedience: Litmus Test for the Democratic Constitutional State', *Berkeley Journal of Sociology*, 30 (95-116).

Habermas, Jürgen (1987) *The Philosophical Discourse of Modernity*, translated by Frederick Lawrence, Oxford: Polity.

Habermas, Jürgen (1993) *Justification and Application: Remarks on Discourse Ethics*, translated by Ciaran Cronin, Oxford: Polity.

Habermas, Jürgen (1996) *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, translated by William Rehg, Oxford: Polity.

Habermas, Jürgen (1998) *The Inclusion of the Other: Studies in Political Theory*, edited by Ciaran Cronin and Pablo De Greiff, Cambridge, Mass.: The MIT Press.

Habermas, Jürgen (2002) *The Postnational Constellation: Political Essays*, translated, edited and with an introduction by Max Pensky, Oxford: Polity.

Haksar, Vinit (1991) 'Civil Disobedience and Non-co-operation', in Bedau, Hugo Adam (ed.) *Civil Disobedience in Focus*, London: Routledge.

- Hampton, Jean (1998) *Political Philosophy*, Oxford: Westview Press.
- Hart, H.L.A. (1994) *The Concept of Law: Second Edition*, Oxford: Oxford University Press.
- Harvey, David (2000) *Spaces of Hope*, Edinburgh: Edinburgh University Press.
- Hayward, Tim (1998) *Political Theory and Ecological Values*, Oxford: Polity.
- Heater, Derek (1990) *Citizenship: The Civic Ideal in World History, Politics and Education*, London: Longman.
- Hegel, G. W. F. (1991) *Elements of the Philosophy of Right*, edited by Allen Wood, translated by H. B. Nisbet, Cambridge: Cambridge University Press.
- Held, David (1995) *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance*, Oxford: Polity.
- Held, David and McGrew, Anthony (2002) *Globalisation/Anti-Globalisation*, Oxford: Polity.
- Holtman, Sarah Williams (2002) 'Revolution, Contradiction, and Kantian Citizenship' in Timmons, Mark (ed.) *Kant's Metaphysics of Morals: Interpretative Essays*, Oxford: Oxford University Press.
- Hurley, Susan (1989) *Natural Reasons: Personality and Polity*, Oxford: Oxford University Press.
- Hurley, Susan (2000) 'Cognitivism in Political Philosophy', in Crisp, Roger and Hooker, Brad (eds.) *Well-Being and Morality: Essays in Honour of James Griffin*, Oxford: Oxford University Press.
- Ignatieff, Michael (1993) *Blood and Belonging: Journeys into the New Nationalism*, London: Chatto & Windus.
- James, G.G. (1973) 'The Orthodox Theory of Civil Disobedience', *Social Theory and Practice*, 2:4, 475-498.
- Kadish, Mortimer and Kadish, Stanford (1973) *Discretion to Disobey: A Study of Lawful Departures for Legal Rules*, Stanford: Stanford University Press.
- Kaldor, Mary (2003) *Global Civil Society: An Answer to War*, Oxford: Polity.
- Kant, Immanuel (1970) *Political Writings*, edited with an introduction and notes by Hans Reiss, translated by H.B. Nisbet, Cambridge: Cambridge University Press.

Kant, Immanuel (1996) *The Metaphysics of Morals*, translated and edited by Mary Gregor, Cambridge: Cambridge University Press.

Kaplan, Esther (2002) 'This City is Ours', in Shepard, Benjamin and Hayduck, Ronald (eds.) *From ACT UP to the WTO: Urban Protest and Community Building in the Era of Globalisation*, London: Verso.

Keane, John (2001) 'Global Civil Society?' in Anheier, Helmut, Glasius, Marlies and Kaldor, Mary (eds.) *Global Civil Society 2001*, Oxford: Oxford University Press.

Keck, Margaret E. and Sikkink, Kathryn (1998) *Activists Beyond Borders: Advocacy Networks in International Politics*, London: Cornell University Press.

Keeton, Morris (1965) 'The Morality of Civil Disobedience', *Texas Law Review*, 43:4, 507-525.

King Jr., Martin Luther (1991) 'Letter From Birmingham City Jail' in Bedau, Hugo Adam (ed.) *Civil Disobedience in Focus*, London: Routledge.

King, Richard H. (1996) *Civil Rights and the Idea of Freedom*, London: University of Georgia Press.

Klein, Naomi (2000) *No Logo*, London: Flamingo.

Knight, Jack and Johnson, James (1997) 'What Sort of Equality Does Deliberative Democracy Require?' in Bohman, James and Rehg, William (eds.) *Deliberative Democracy: Essays on Reason and Politics*, London: The MIT Press.

Korsgaard, Christine M. (1997) 'Taking the Law into Our Own Hands: Kant on the Right to Revolution' in Reith, Andrew, Herman, Barbara, and Korsgaard, Christine M. (eds.) *Reclaiming the History of Ethics: Essays for John Rawls*, Cambridge: Cambridge University Press.

Kukathas, Chandran and Pettit, Philip (1990) *Rawls: A Theory of Justice and its Critics*, Cambridge: Polity.

Kymlicka, Will (2001) 'Citizenship in an Era of Globalisation: Commentary on Held' in Kymlicka, Will *Politics in the Vernacular: Nationalism, Multiculturalism, and Citizenship*, Oxford: Oxford University Press.

Kymlicka, Will (2002) *Contemporary Political Philosophy: An Introduction*, second edition, Oxford: Oxford University Press.

Larmore, Charles (2003) 'Public Reason', in Freeman, Samuel (ed.) *The Cambridge Companion to Rawls*, Cambridge: Cambridge University Press.

- Lindblom, Charles E. (1982) 'The Market as Prison', *The Journal of Politics*, 44:2, 324-336.
- Linklater, Andrew (1998) *The Transformation of Political Community*, Oxford: Polity.
- Locke, John (1993) *Political Writings*, edited with an introduction by David Wootton, London: Penguin.
- Low, Nicholas and Gleeson, Brendan (1998) *Justice, Society and Nature: an exploration of political ecology*, London: Routledge.
- Lyons, David (1998) 'Moral Judgment, Historical Reality, and Civil Disobedience', *Philosophy and Public Affairs*, 27:1, 31-49.
- Marable, Manning (1991) *Race, Reform and Rebellion: The Second Reconstruction in Black America, Revised Second Edition*, London: University Press of Mississippi.
- Marshall, Burke (1965) 'The Protest Movement and the Law', *Virginia Law Review*, 51:5, 785-803.
- Martin, Rex (1993) *A System of Rights*, Oxford: Oxford University Press.
- McWilliams, Wilson Carey (1969) 'Civil Disobedience and Contemporary Constitutionalism: The American Case', *Comparative Politics*, 1:2: 211-227.
- Michelman, Frank I. (2003) 'Rawls on Constitutionalism and Constitutional Law' in Freeman, Samuel (ed.) *The Cambridge Companion to Rawls*, Cambridge: Cambridge University Press.
- Miller, David (2000) *Citizenship and National Identity*, Oxford: Polity.
- Milne, A. J. M. (1990) 'Political Obligation and the Public Interest' in Harris, Paul (ed.) *On Political Obligation*, London: Routledge.
- Monbiot, George (2003) *The Age of Consent: A Manifesto for a New World Order*, London: Flamingo.
- Mouffe, Chantal (2000) *The Democratic Paradox*, London: Verso.
- Nicholson, Peter (1976) 'Kant on the Duty Never to Resist the Sovereign', *Ethics*, 86:3, 214-230.
- Norrie, Alan (1993) *Crime, Reason and History: A Critical Introduction to Criminal Law*, London: Weidenfeld & Nicolson.

- Offe, Clause (1984) *Contradictions of the Welfare State*, edited by John Keane, Hutchinson: London.
- O'Neill, Onora (1996) 'Kant's Virtue's' in Crisp, Roger (ed.) *How Should One Live? Essays on the Virtues*, Oxford: Clarendon Press.
- Parfit, Derek (1984) *Reasons and Persons*, Oxford: Clarendon Press.
- Parry, Gerant (1978) *John Locke*, London: George Allen & Unwin.
- Pateman, Carole (1979) *The Problem of Political Obligation: A Critique of Liberal Theory*, Cambridge: Polity.
- Pettit, Philip (1997) *Republicanism: A Theory of Freedom and Government*, Oxford: Oxford University Press.
- Pettit, Philip (2001) *A Theory of Freedom: From the Psychology to the Politics of Agency*, Oxford: Polity.
- Pettit, Philip (2003) 'The Discursive Dilemma and Republican Theory' in Fishkin, James S. and Laslett, Peter (eds.) *Debating Deliberative Democracy*, London: Blackwell.
- Pogge, Thomas (1989) *Realizing Rawls*, Ithica: Cornell University Press.
- Pogge, Thomas (2002) *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms*, Oxford: Polity.
- Porta, Della and Diani, Mario (1999) *Social Movements: An Introduction*, Oxford: Blackwell.
- Puner, Nicholas W. (1968) 'Civil Disobedience: An Analysis and Rationale', *New York University Law Review*, 43:4, 651-720.
- Randle, Michael (1994) *Civil Resistance*, London: Fontana Press.
- Rawls, John (1972) *A Theory of Justice*, Oxford: Oxford University Press.
- Rawls, John (1996) *Political Liberalism: With a New Introduction and the 'Reply to Habermas'*, New York: Columbia University Press.
- Rawls, John (1999a) *The Law of Peoples with 'The Idea of Public Reason Revisited'*, London: Harvard University Press.
- Rawls, John (1999b) *Collected Papers*, edited by Samuel Freeman, London: Harvard University Press.

Rawls, John (2001) *Justice as Fairness: A Restatement*, edited by Erin Kelly, London: Harvard University Press.

Raz, Joseph (1986) *The Morality of Freedom*, Oxford: Clarendon Press.

Raz, Joseph (1991) 'Civil Disobedience' in Bedau, Hugo Adam (ed.) *Civil Disobedience in Focus*, London: Routledge.

Rehg, William and Bohman, James (1996) 'Discourse and Democracy: The Formal and Informal Basis of Legitimacy in Habermas' *Faktizität und Geltung*' *The Journal of Political Philosophy*, 4:1, 79-99.

Rorty, Richard (1989) *Contingency, Irony, and Solidarity*, Cambridge: Cambridge University Press.

Rorty, Richard (1991) 'The priority of democracy to philosophy', in Rorty, Richard *Objectivity, Relativism, and Truth: Philosophical Papers Volume 1*, Cambridge: Cambridge University Press.

Sabl, Andrew (2001) 'Looking Forward to Justice: Rawlsian Civil Disobedience and its Non-Rawlsian Lessons' *The Journal of Political Philosophy*, 9:3, 307-330.

Said, Edward (2002) *The End of the Peace Process: Revised and Updated Edition*, London: Granta Books.

Sandel, Michael J. (1998) *Liberalism and the Limits of Justice: second edition*, Cambridge: Cambridge University Press.

Sawyer, Eric (2002) 'An ACT UP founder "acts up" for Africa's access to AIDS', in Shepard, Benjamin and Hayduck, Ronald (eds.) *From ACT UP to the WTO: Urban Protest and Community Building in the Era of Globalisation*, London: Verso.

Scheuerman, William E. (1999) 'Between Radicalism and Resignation: Democratic Theory in Habermas' *Between Facts and Norms*', in Dews, Peter (ed.) *Habermas: A Critical Reader*, Oxford: Blackwell.

Schlossberger, Eugene (1989) 'Civil Disobedience', *Analysis*, 49:3, 148-153.

Scholte, Jan Aart (2000) *Globalization: A Critical Introduction*, Hampshire: Palgrave.

Schwarz, Wolfgang (1964) 'The Right of Resistance', *Ethics*, 74:2, 126-134.

Shapiro, Ian and Hacker-Cordón, Casiaro (eds.) (1999) *Democracy's Edges*, Cambridge: Cambridge University Press.

Shiffrin, Steven H. (1999) *Dissent, Injustice, and the Meanings of America*, Princeton: Princeton University Press.

Simmons, A. John (1979) *Moral Principles and Political Obligations*, Princeton: Princeton University Press.

Singer, Peter (1973) *Democracy and Disobedience*, Oxford: Clarendon Press.

Sklair, Leslie (2002) *Globalization: Capitalism and its Alternatives*, Oxford: Oxford University Press.

Smart, Brian (1991) 'Defining Civil Disobedience', in Bedau, Hugo Adam (ed.) *Civil Disobedience in Focus*, London: Routledge.

Sparks, Holloway (1997) 'Dissident Citizenship: Democratic Theory, Political Change, and Activist Women', *Hypatia: Journal of Feminist Philosophy*, 12:4, 74-109.

Spitz, David (1954) 'Democracy and the Problem of Civil Disobedience', *American Political Science Review*, 48:2, 386-403.

Stiglitz, Joseph (2002) *Globalisation and its Discontents*, London: Penguin.

Storing, Herbert J. (1991) 'The Case Against Civil Disobedience' in Bedau, Hugo Adam (ed.) *Civil Disobedience*, New York: Pegasus.

Sunstein, Cass R. (1995) *Democracy and the Problem of Free Speech: With a New Afterword*, London: The Free Press.

Sunstein, Cass R. (2003) 'The Law of Group Polarization' in Fishkin, James S. and Laslett, Peter (eds.) *Debating Deliberative Democracy*, London: Blackwell.

Taylor, William L. (1969) 'Civil Disobedience: Observations on the Strategies of Protest', in Bedau, Hugo Adam (ed.) *Civil Disobedience*, New York: Pegasus.

Terchek, Ronald J. (1998) *Gandhi: Struggling for Autonomy*, Oxford: Rowman & Littlefield.

Thomas, D.A. Lloyd (1995) *Locke on Government*, London: Routledge.

Thoreau, Henry David (1991) 'Civil Disobedience' in Bedau, Hugo Adam (ed.) *Civil Disobedience in Focus*, London: Routledge.

Tracey, James (2002) *The Civil Disobedience Handbook: A Brief History and Practical Advice for the Politically Disenchanted*, San Francisco: Manic D Press.

Tweed, Harrison, Segal, Bernard G. and Packer, Herbert L. (1969) 'Civil Rights and Civil Disobedience to Law', in Bedau, Hugo Adam (ed.) *Civil Disobedience*, New York: Pegasus.

Valcke, Catherine (1994) 'Civil Disobedience and the Rule of Law – A Lockean Insight', in Shapiro, Ian (ed.) *The Rule of Law*, New York: New York University Press.

Waldman, Louis (1969) 'Civil Rights – Yes; Civil Disobedience – No (A Reply to Dr. Martin Luther King)', in Bedau, Hugo Adam (ed.) *Civil Disobedience*, New York: Pegasus.

Walen, Alec (2001) 'Reasonable Illegal Force: Justice and Legitimacy in a Pluralistic, Liberal Society', *Ethics*, 111:2, 344-373.

Walzer, Michael (1967) 'The Obligation to Disobey', *Ethics*, 77:3, 163-175.

Wood, Lesley J. and Moore, Kelly (2002) 'Target Practice: Community Activism in a Global Era' in Shepard, Benjamin and Hayduk, Ronald (eds.) *From ACT UP to the WTO: Urban Protest and Community Building in the Era of Globalization*, London: Verso.

Young, Iris Marion (2000) *Inclusion and Democracy*, Oxford: Oxford University Press.

Young, Iris Marion (2003) 'Activist Challenges to Deliberative Democracy', in Fishkin, James S. and Laslett, Peter (eds.) *Debating Deliberative Democracy*, London: Blackwell.

Zashin, Elliot M. (1972) *Civil Disobedience and Democracy*, London: The Free Press.

Zinn, Howard (1968) *Disobedience and Democracy: Nine Fallacies on Law and Order*, New York: Random House.